



Health and Social Care Act 2012

2012 CHAPTER 7

PART 3

REGULATION OF HEALTH AND ADULT SOCIAL CARE SERVICES

CHAPTER 1

MONITOR

61 Monitor

- (1) The body corporate known as the Independent Regulator of NHS Foundation Trusts—
 - (a) is to continue to exist, and
 - (b) is to be known as Monitor.
- (2) Schedule 8 (which makes further provision about Monitor) has effect.

62 General duties

- (1) The main duty of Monitor in exercising its functions is to protect and promote the interests of people who use health care services by promoting provision of health care services which—
 - (a) is economic, efficient and effective, and
 - (b) maintains or improves the quality of the services.
- (2) In carrying out its main duty, Monitor must have regard to the likely future demand for health care services.
- (3) Monitor must exercise its functions with a view to preventing anti-competitive behaviour in the provision of health care services for the purposes of the NHS which is against the interests of people who use such services.

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- (4) Monitor must exercise its functions with a view to enabling health care services provided for the purposes of the NHS to be provided in an integrated way where it considers that this would—
 - (a) improve the quality of those services (including the outcomes that are achieved from their provision) or the efficiency of their provision,
 - (b) reduce inequalities between persons with respect to their ability to access those services, or
 - (c) reduce inequalities between persons with respect to the outcomes achieved for them by the provision of those services.
- (5) Monitor must exercise its functions with a view to enabling the provision of health care services provided for the purposes of the NHS to be integrated with the provision of health-related services or social care services where it considers that this would—
 - (a) improve the quality of those health care services (including the outcomes that are achieved from their provision) or the efficiency of their provision,
 - (b) reduce inequalities between persons with respect to their ability to access those health care services, or
 - (c) reduce inequalities between persons with respect to the outcomes achieved for them by the provision of those health care services.
- (6) Monitor must, in carrying out its duties under subsections (4) and (5), have regard to the way in which—
 - (a) the National Health Service Commissioning Board carries out its duties under section 13N of the National Health Service Act 2006, and
 - (b) clinical commissioning groups carry out their duties under section 14Z1 of that Act.
- (7) Monitor must secure that people who use health care services, and other members of the public, are involved to an appropriate degree in decisions that Monitor makes about the exercise of its functions (other than decisions it makes about the exercise of its functions in a particular case).
- (8) Monitor must obtain advice appropriate for enabling it effectively to discharge its functions from persons who (taken together) have a broad range of professional expertise in—
 - (a) the prevention, diagnosis or treatment of illness (within the meaning of the National Health Service Act 2006), and
 - (b) the protection or improvement of public health.
- (9) Monitor must exercise its functions in a manner consistent with the performance by the Secretary of State of the duty under section 1(1) of the National Health Service Act 2006 (promotion of comprehensive health service).
- (10) Monitor must not exercise its functions for the purpose of causing a variation in the proportion of health care services provided for the purposes of the NHS that is provided by persons of a particular description if that description is by reference to—
 - (a) whether the persons in question are in the public or (as the case may be) private sector, or
 - (b) some other aspect of their status.
- (11) In this section—

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“health-related services” means services that may have an effect on people’s health but are not health care services or social care services;

“social care services” means services that are provided in pursuance of the social services functions of local authorities (within the meaning of the Local Authority Social Services Act 1970).

63 Secretary of State’s guidance on duty under section 62(9)

- (1) The Secretary of State may, for the purpose of assisting Monitor to comply with its duty under section 62(9), publish guidance on—
 - (a) the objectives specified in the mandate published under section 13A of the National Health Service Act 2006 which the Secretary of State considers to be relevant to Monitor’s exercise of its functions, and
 - (b) the Secretary of State’s reasons for considering those objectives to be relevant to Monitor’s exercise of its functions.
- (2) In exercising its functions, Monitor must have regard to guidance under subsection (1).
- (3) Where the Secretary of State publishes guidance under subsection (1), the Secretary of State must lay a copy of the published guidance before Parliament.
- (4) The Secretary of State—
 - (a) may revise guidance under subsection (1), and
 - (b) if the Secretary of State does so, must publish the guidance as revised and lay it before Parliament.

64 General duties: supplementary

- (1) This section applies for the purposes of this Part.
- (2) “Anti-competitive behaviour” means behaviour which would (or would be likely to) prevent, restrict or distort competition and a reference to preventing anti-competitive behaviour includes a reference to eliminating or reducing the effects (or potential effects) of the behaviour.
- (3) “Health care” means all forms of health care provided for individuals, whether relating to physical or mental health, with a reference in this Part to health care services being read accordingly; and for the purposes of this Part it does not matter if a health care service is also an adult social care service (as to which, see section 65).
- (4) “The NHS” means the comprehensive health service continued under section 1(1) of the National Health Service Act 2006, except the part of it that is provided in pursuance of the public health functions (within the meaning of that Act) of the Secretary of State or local authorities.
- (5) A reference to the provision of health care services for the purposes of the NHS is a reference to their provision for those purposes in accordance with that Act.
- (6) Nothing in section 62 requires Monitor to do anything in relation to the supply to persons who provide health care services of goods that are to be provided as part of those services.

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65 Power to give Monitor functions relating to adult social care services

- (1) Regulations may provide for specified functions of Monitor also to be exercisable in relation to adult social care services.
- (2) Any regulations under this section must apply in relation to England only.
- (3) The regulations may amend this Part.
- (4) “Adult social care”—
 - (a) includes all forms of personal care and other practical assistance provided for individuals who, by reason of age, illness, disability, pregnancy, childbirth, dependence on alcohol or drugs, or any other similar circumstances, are in need of such care or other assistance, but
 - (b) does not include anything provided by an establishment or agency for which Her Majesty’s Chief Inspector of Education, Children’s Services and Skills is the registration authority under section 5 of the Care Standards Act 2000.

66 Matters to have regard to in exercise of functions

- (1) In exercising its functions, Monitor must have regard, in particular, to the need to maintain the safety of people who use health care services.
- (2) Monitor must, in exercising its functions, also have regard to the following matters in so far as they are consistent with the matter referred to in subsection (1)—
 - (a) the desirability of securing continuous improvement in the quality of health care services provided for the purposes of the NHS and in the efficiency of their provision,
 - (b) the need for commissioners of health care services for the purposes of the NHS to ensure that the provision of access to the services for those purposes operates fairly,
 - (c) the need for commissioners of health care services for the purposes of the NHS to ensure that people who require health care services for those purposes are provided with access to them,
 - (d) the need for commissioners of health care services for the purposes of the NHS to make the best use of resources when doing so,
 - (e) the desirability of persons who provide health care services for the purposes of the NHS co-operating with each other in order to improve the quality of health care services provided for those purposes,
 - (f) the need to promote research into matters relevant to the NHS by persons who provide health care services for the purposes of the NHS,
 - (g) the need for high standards in the education and training of health care professionals who provide health care services for the purposes of the NHS, and
 - (h) where the Secretary of State publishes a document for the purposes of section 13E of the National Health Service Act 2006 (improvement of quality of services), any guidance published by the Secretary of State on the parts of that document which the Secretary of State considers to be particularly relevant to Monitor’s exercise of its functions.
- (3) Where the Secretary of State publishes guidance referred to in subsection (2)(h), the Secretary of State must lay a copy of the published guidance before Parliament.

- (4) The Secretary of State—
 - (a) may revise the guidance, and
 - (b) if the Secretary of State does so, must publish the guidance as revised and lay it before Parliament.

67 Conflicts between functions

- (1) In a case where Monitor considers that any of its general duties conflict with each other, it must secure that the conflict is resolved in the manner it considers best.
- (2) Monitor must act so as to secure that there is not, and could not reasonably be regarded as being, a conflict between—
 - (a) its exercise of any of its functions under Chapter 5 of Part 2 of the National Health Service Act 2006 (regulation of NHS foundation trusts) or under sections 111 and 113 of this Act (imposition of licence conditions on NHS foundation trusts during transitional period) or under paragraph 17 of Schedule 8 to this Act (accounts of NHS foundation trusts), and
 - (b) its exercise of any of its other functions.
- (3) Monitor must ignore the functions it has under sections 111 and 113 when exercising—
 - (a) its functions under Chapter 2 (competition);
 - (b) its functions under Chapter 4 (pricing).
- (4) If Monitor secures the resolution of a conflict between its general duties in a case that comes within subsection (5), or that Monitor considers is otherwise of unusual importance, it must publish a statement setting out—
 - (a) the nature of the conflict,
 - (b) the manner in which it decided to resolve it, and
 - (c) its reasons for deciding to resolve it in that manner.
- (5) A case comes within this subsection if it involves—
 - (a) a matter likely to have a significant impact on persons who provide health care services for the purposes of the NHS;
 - (b) a matter likely to have a significant impact on people who use health care services provided for the purposes of the NHS;
 - (c) a matter likely to have a significant impact on the general public in England (or in a particular part of England);
 - (d) a major change in the activities Monitor carries on;
 - (e) a major change in the standard conditions of licences under Chapter 3 (see section 94).
- (6) Where Monitor is required to publish a statement under subsection (4), it must do so as soon as reasonably practicable after making its decision.
- (7) The duty under subsection (4) does not apply in so far as Monitor is subject to an obligation not to publish a matter that needs to be included in the statement.
- (8) Every annual report of Monitor must include—
 - (a) a statement of the steps it has taken in the financial year to which the report relates to comply with the duty under subsection (2), and

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- (b) a summary of the manner in which, in that financial year, Monitor has secured the resolution of conflicts between its general duties arising in cases of the kind referred to in subsection (5).
- (9) Monitor’s general duties for the purposes of this section are its duties under sections 62 and 66.

68 Duty to review regulatory burdens

- (1) Monitor must keep the exercise of its functions under review and secure that in exercising its functions it does not—
- (a) impose burdens which it considers to be unnecessary, or
 - (b) maintain burdens which it considers to have become unnecessary.
- (2) In keeping the exercise of its functions under review, Monitor must have regard to such principles as appear to it to represent best regulatory practice.
- (3) Subsection (1) does not require the removal of a burden which has become unnecessary where its removal would, having regard to all the circumstances, be impractical or disproportionate.
- (4) Monitor must from time to time publish a statement setting out—
- (a) what it proposes to do pursuant to subsection (1) in the period to which the statement relates,
 - (b) what it has done pursuant to that subsection since publishing the previous statement, and
 - (c) where a burden relating to the exercise of the function which has become unnecessary is maintained pursuant to subsection (3), the reasons why removal of the burden would, having regard to all the circumstances, be impractical or disproportionate.
- (5) The first statement—
- (a) must be published as soon as practicable after the commencement of this section, and
 - (b) must relate to the period of 12 months beginning with the date of publication.
- (6) A subsequent statement—
- (a) must be published during the period to which the previous statement related or as soon as reasonably practicable after that period, and
 - (b) must relate to the period of 12 months beginning with the end of the previous period.
- (7) Monitor must, in exercising its functions, have regard to the statement that is in force at the time in question.
- (8) Monitor may revise a statement before or during the period to which it relates; and, if it does so, it must publish the revision as soon as reasonably practicable.

69 Duty to carry out impact assessments

- (1) This section applies where Monitor is proposing to do something that it considers would be likely—

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- (a) to have a significant impact on persons who provide health care services for the purposes of the NHS;
 - (b) to have a significant impact on people who use health care services provided for the purposes of the NHS;
 - (c) to have a significant impact on the general public in England (or in a particular part of England);
 - (d) to involve a major change in the activities Monitor carries on;
 - (e) to involve a major change in the standard conditions of licences under Chapter 3 (see section 94).
- (2) But this section does not apply to—
 - (a) the carrying out by Monitor of an analysis of how markets involving the provision of health care services are operating, or
 - (b) the exercise of functions under or by virtue of Chapter 2.
- (3) Nor does this section apply if it appears to Monitor that the urgency of the matter makes compliance with this section impracticable or inappropriate.
- (4) Before implementing the proposal, Monitor must either—
 - (a) carry out and publish an assessment of the likely impact of implementation, or
 - (b) publish a statement setting out its reasons for concluding that it does not need to carry out an assessment under paragraph (a).
- (5) The assessment must set out Monitor’s explanation of how the discharge of its general duties (within the meaning of section 67)—
 - (a) would be secured by implementation of the proposal, but
 - (b) would not be secured by the exercise of functions that Monitor has by virtue of section 72 or 73.
- (6) The assessment may take such form, and relate to such matters, as Monitor may determine; and in determining the matters to which the assessment is to relate, Monitor must have regard to such general guidance on carrying out impact assessments as it considers appropriate.
- (7) The assessment must specify the consultation period within which representations with respect to the proposal may be made to Monitor; and for that purpose the consultation period must not be less than 28 days beginning with the day after that on which the assessment is published under subsection (4).
- (8) Monitor may not implement the proposal unless the consultation period has ended.
- (9) Where Monitor is required (apart from this section) to consult about, or afford a person an opportunity to make representations about, a proposal that comes within subsection (1), the requirements of this section—
 - (a) are in addition to the other requirement, but
 - (b) may be met contemporaneously with it.
- (10) Every annual report of Monitor must set out—
 - (a) a list of the assessments carried out under this section during the financial year to which the report relates, and
 - (b) a summary of the decisions taken during that year in relation to proposals to which assessments carried out during that year or a previous financial year relate.

70 Information

- (1) Information obtained by, or documents, records or other items produced to, Monitor in connection with any of its functions may be used by Monitor in connection with any of its other functions.
- (2) For the purposes of exercising a function under this Part, the Secretary of State may request Monitor to provide the Secretary of State with such information as the Secretary of State may specify.
- (3) Monitor must comply with a request under subsection (2).

71 Failure to perform functions

- (1) This section applies if the Secretary of State considers that Monitor is failing, or has failed, to perform any function of Monitor's, other than a function it has by virtue of section 72 or 73, and that the failure is significant.
- (2) The Secretary of State may direct Monitor to perform such of those functions, and in such manner and within such period, as the direction specifies.
- (3) But the Secretary of State may not give a direction under subsection (2) in relation to the performance of functions in a particular case.
- (4) If Monitor fails to comply with a direction under subsection (2), the Secretary of State may—
 - (a) perform the functions to which the direction relates, or
 - (b) make arrangements for some other person to perform them on the Secretary of State's behalf.
- (5) Where the Secretary of State exercises a power under subsection (2) or (4), the Secretary of State must publish the reasons for doing so.
- (6) For the purposes of this section—
 - (a) a failure to perform a function includes a failure to perform it properly, and
 - (b) a failure to perform a function properly includes a failure to perform it consistently with what the Secretary of State considers to be the interests of the health service in England or (as the case may be) with what otherwise appears to the Secretary of State to be the purpose for which it is conferred; and “the health service” has the same meaning as in the National Health Service Act 2006.

CHAPTER 2

COMPETITION

72 Functions under the Competition Act 1998

- (1) The functions referred to in subsection (2) are concurrent functions of Monitor and the Office of Fair Trading.
- (2) The functions are those that the Office of Fair Trading has under Part 1 of the Competition Act 1998, other than sections 31D(1) to (6), 38(1) to (6) and 51, so far

as relating to any of the following which concern the provision of health care services in England—

- (a) agreements, decisions or concerted practices of the kind mentioned in section 2(1) of that Act (anti-competitive practices),
 - (b) conduct of the kind mentioned in section 18(1) of that Act (abuse of dominant position),
 - (c) agreements, decisions or concerted practices of the kind mentioned in Article 101 of the Treaty on the Functioning of the European Union (anti-competitive practices),
 - (d) conduct which amounts to abuse of the kind mentioned in Article 102 of that Treaty (abuse of dominant position).
- (3) So far as necessary for the purposes of subsections (1) and (2), references in Part 1 of the Competition Act 1998 to the Office of Fair Trading are to be read as including references to Monitor, except in sections 31D(1) to (6), 38(1) to (6), 51, 52(6) and (8) and 54.

73 Functions under Part 4 of the Enterprise Act 2002

- (1) The functions referred to in subsection (2) are concurrent functions of Monitor and the Office of Fair Trading.
- (2) The functions are those that the Office of Fair Trading has under Part 4 of the Enterprise Act 2002 (market investigations), other than sections 166 and 171, so far as relating to activities which concern the provision of health care services in England.
- (3) So far as necessary for the purposes of subsections (1) and (2), references in Part 4 of the Enterprise Act 2002 to the Office of Fair Trading (including references in provisions of that Act applied by that Part) are to be read as including references to Monitor, except in sections 166 and 171.
- (4) Before the Office of Fair Trading or Monitor first exercises functions which are exercisable concurrently by virtue of this section, it must consult the other.
- (5) Neither the Office of Fair Trading nor Monitor may exercise in relation to any matter functions which are exercisable concurrently by virtue of this section if functions which are so exercisable have been exercised in relation to that matter by the other.
- (6) Section 117 of the Enterprise Act 2002 (offences of supplying false or misleading information) as applied by section 180 of that Act is to have effect so far as relating to functions exercisable by Monitor by virtue of this section as if the references in section 117(1)(a) and (2) to the Office of Fair Trading included references to Monitor.

74 Competition functions: supplementary

- (1) No objection may be taken to anything done by or in relation to Monitor under the Competition Act 1998 or Part 4 of the Enterprise Act 2002 on the ground that it should have been done by or in relation to the Office of Fair Trading.
- (2) Subject to subsection (3), sections 62 and 66 (general duties of Monitor) do not apply in relation to anything done by Monitor in the carrying out of its functions by virtue of section 72 or 73.

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- (3) In the carrying out of any functions by virtue of section 72 or 73, Monitor may nevertheless have regard to any of the matters in respect of which a duty is imposed by section 62 or 66 if it is a matter to which the Office of Fair Trading is entitled to have regard in the carrying out of those functions.
- (4) In section 9E of the Company Directors Disqualification Act 1986 (specified regulators in cases of disqualification for competition infringements), in subsection (2) after paragraph (e) insert “;”
 (f) Monitor.”
- (5) In section 54 of the Competition Act 1998, in subsection (1) (definition of “regulator” for the purposes of Part 1 of that Act)—
 (a) omit the “and” preceding paragraph (g), and
 (b) after that paragraph insert “; and”
 (h) Monitor.”
- (6) In section 136 of the Enterprise Act 2002 (investigations and reports on market investigation references)—
 (a) in subsection (7) (meaning of “relevant sectoral enactment”), at the end insert—
 “(i) in relation to Monitor, section 73 of the Health and Social Care Act 2012.”,
 (b) in subsection (8) (meaning of “relevant sectoral regulator”), for “Communications or” substitute “Communications,”, and
 (c) in that subsection, after “Utility Regulation” insert “or Monitor”.
- (7) In section 168 of that Act (regulated markets)—
 (a) in subsection (3) (meaning of “relevant action”), after paragraph (o) insert—
 “(p) modifying the conditions of a licence issued under section 87 of the Health and Social Care Act 2012.”,
 (b) in subsection (4) (meaning of “relevant statutory functions”), after paragraph (q) insert—
 “(r) in relation to any licence issued under section 87 of the Health and Social Care Act 2012, the duties of Monitor under sections 62 and 66 of that Act.”, and
 (c) in subsection (5) (meaning of “sectoral regulator”), after paragraph (i) insert—
 “(ia) Monitor;”.

75 Requirements as to procurement, patient choice and competition

- (1) Regulations may impose requirements on the National Health Service Commissioning Board and clinical commissioning groups for the purpose of securing that, in commissioning health care services for the purposes of the NHS, they—
 (a) adhere to good practice in relation to procurement;
 (b) protect and promote the right of patients to make choices with respect to treatment or other health care services provided for the purposes of the NHS;
 (c) do not engage in anti-competitive behaviour which is against the interests of people who use such services.

- (2) Requirements imposed by regulations under this section apply to an arrangement for the provision of goods and services only if the value of the consideration attributable to the services is greater than that attributable to the goods.
- (3) Regulations under this section may, in particular, impose requirements relating to—
 - (a) competitive tendering for the provision of services;
 - (b) the management of conflicts between the interests involved in commissioning services and the interests involved in providing them.
- (4) The regulations may provide for the requirements imposed, or such of them as are prescribed, not to apply in relation to arrangements of a prescribed description.

76 Requirements under section 75: investigations, declarations and directions

- (1) Regulations under section 75 may confer on Monitor—
 - (a) a power to investigate a complaint that the National Health Service Commissioning Board or a clinical commissioning group has failed to comply with a requirement imposed by the regulations;
 - (b) a power to investigate on its own initiative whether the Board or a clinical commissioning group has failed to comply with a requirement imposed by virtue of section 75(1)(c);
 - (c) a power to require the Board or a clinical commissioning group to provide it with such information as Monitor may specify for the purposes of an investigation it carries out by virtue of paragraph (a) or (b);
 - (d) a power to require the Board or a clinical commissioning group to provide an explanation of such information as it provides by virtue of paragraph (c).
- (2) A power conferred by virtue of subsection (1)(a) is exercisable only where Monitor considers that the person making the complaint has sufficient interest in the arrangement to which the complaint relates.
- (3) Regulations under section 75 may confer on Monitor a power to declare that an arrangement for the provision of health care services for the purposes of the NHS is ineffective.
- (4) A power conferred by virtue of subsection (3) is exercisable only in prescribed circumstances and subject to prescribed restrictions and only where Monitor is satisfied that—
 - (a) the National Health Service Commissioning Board or a clinical commissioning group has failed to comply with a requirement of regulations under section 75, and
 - (b) the failure is sufficiently serious.
- (5) On a declaration being made by virtue of subsection (3), the arrangement is void; but that does not affect—
 - (a) the validity of anything done pursuant to the arrangement,
 - (b) any right acquired or liability incurred under the arrangement, or
 - (c) any proceedings or remedy in respect of such a right or liability.
- (6) Regulations under section 75 may confer on Monitor a power to direct the National Health Service Commissioning Board or a clinical commissioning group—

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- (a) to put in place measures for the purpose of preventing failures to comply with requirements imposed by the regulations or mitigating the effect of such failures;
 - (b) to remedy a failure to comply with such a requirement;
 - (c) not to exercise in a prescribed manner prescribed functions in relation to arrangements for the provision of health care services;
 - (d) to vary or withdraw an invitation to tender for the provision of health care services;
 - (e) to vary an arrangement for the provision of health care services made in consequence of putting the provision of the services out to tender.
- (7) A failure to comply with a requirement imposed by regulations under section 75 which causes loss or damage is actionable, except in so far as the regulations restrict the right to bring such an action.
- (8) Regulations under section 75 may—
- (a) provide for a specified defence to such an action;
 - (b) prevent a person who has brought such an action under the Public Contracts Regulations 2006 ([S.I. 2006/5](#)) from bringing such an action under the regulations under section 75 in respect of the whole or part of the same loss or damage.

77 Requirements under section 75: undertakings

- (1) Regulations under section 75 may confer on Monitor a power to accept an undertaking (referred to in this Chapter as a “section 77 undertaking”) from the National Health Service Commissioning Board or a clinical commissioning group to take such action of a kind mentioned in subsection (2) as is specified in the undertaking within such period as is so specified.
- (2) The specified action must be—
- (a) action of a description given in paragraphs (a) to (e) of section 76(6), or
 - (b) action of such a description as may be prescribed.
- (3) Where Monitor accepts a section 77 undertaking then, unless the Board, or (as the case may be) the clinical commissioning group from whom the undertaking is accepted, has failed to comply with the undertaking or any part of it, Monitor may not—
- (a) continue to carry out the investigation in question,
 - (b) make a declaration by virtue of subsection (3) of section 76 in relation to the arrangement in question, or
 - (c) give a direction by virtue of subsection (6) of that section in relation to the failure in question.
- (4) Where the Board, or (as the case may be) the clinical commissioning group from whom Monitor has accepted a section 77 undertaking, has failed to comply fully with the undertaking but has complied with part of it, Monitor must take the partial compliance into account in deciding whether to do something mentioned in paragraphs (a) to (c) of subsection (3).
- (5) Schedule 9 (which makes further provision about section 77 undertakings) has effect.

78 Guidance

- (1) Monitor must publish guidance about—
 - (a) compliance with requirements imposed by regulations under section 75;
 - (b) how it intends to exercise powers conferred on it by regulations under that section.
- (2) Before publishing guidance under subsection (1)(a) or (b), Monitor must consult—
 - (a) the National Health Service Commissioning Board, and
 - (b) such other persons as Monitor considers appropriate.
- (3) Before publishing guidance under subsection (1)(a) or (b), Monitor must obtain the approval of the Secretary of State.
- (4) Monitor may revise guidance under this section and, if it does so, must publish the guidance as revised.
- (5) Before publishing guidance revised under subsection (4), Monitor must consult the persons mentioned in subsection (2).

79 Mergers involving NHS foundation trusts

- (1) For the purposes of Part 3 of the Enterprise Act 2002 (completed and anticipated mergers), each of the following cases is to be treated as being (in so far as it would not otherwise be) a case in which two or more enterprises cease to be distinct enterprises.
- (2) The first case is where the activities of two or more NHS foundation trusts cease to be distinct activities.
- (3) The second case is where the activities of one or more NHS foundation trusts and the activities of one or more businesses cease to be distinct activities.
- (4) Where the Office of Fair Trading decides to carry out an investigation under Part 3 of the Enterprise Act 2002 of a matter involving an NHS foundation trust, it must as soon as reasonably practicable notify Monitor.
- (5) As soon as reasonably practicable after receiving a notification under subsection (4), Monitor must provide the Office of Fair Trading with advice on—
 - (a) the effect of the matter under investigation on benefits (in the form of those within section 30(1)(a) of the Enterprise Act 2002 (relevant customer benefits)) for people who use health care services provided for the purposes of the NHS, and
 - (b) such other matters relating to the matter under investigation as Monitor considers appropriate.
- (6) In subsections (2) and (3), a reference to the activities of an NHS foundation trust or a business includes a reference to part of its activities.
- (7) In this section, “enterprise” and “business” each have the same meaning as in Part 3 of the Enterprise Act 2002.

80 Co-operation with the Office of Fair Trading

- (1) Monitor and the Office of Fair Trading must co-operate with each other in the exercise of their respective functions under the Competition Act 1998 and the Enterprise Act 2002.
- (2) In particular each must give the other—
 - (a) such information in its possession as the other may require to enable it to exercise those functions,
 - (b) such other information in its possession as it considers would assist the other in exercising those functions, and
 - (c) such other assistance as the other may require to assist it in exercising those functions.

CHAPTER 3

LICENSING

Licensing requirement

81 Requirement for health service providers to be licensed

- (1) Any person who provides a health care service for the purposes of the NHS must hold a licence under this Chapter.
- (2) Regulations may make provision for the purposes of this Chapter for determining, in relation to a service provided by two or more persons acting in different capacities, which of those persons is to be regarded as the person who provides the service.

82 Deemed breach of requirement to be licensed

- (1) This section applies where a licence holder—
 - (a) in providing a health care service for the purposes of the NHS, carries on a regulated activity (within the meaning of Part 1 of the Health and Social Care Act 2008), but
 - (b) is not registered under Chapter 2 of Part 1 of that Act in respect of the carrying on of that activity.
- (2) The licence holder is to be regarded as providing the service in breach of the requirement under section 81 to hold a licence.

83 Exemption regulations

- (1) Regulations (referred to in this section and section 84 as “exemption regulations”) may provide for the grant of exemptions from the requirement under section 81 in respect of—
 - (a) a prescribed person or persons of a prescribed description;
 - (b) the provision of a prescribed health care service or a health care service of a prescribed description.
- (2) Exemption regulations may grant an exemption—

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- (a) either generally or to the extent prescribed;
 - (b) either unconditionally or subject to prescribed conditions;
 - (c) indefinitely, for a prescribed period or for a period determined by or under the exemption.
- (3) Conditions subject to which an exemption may be granted include, in particular, conditions requiring any person providing a service pursuant to the exemption—
- (a) to comply with any direction given by Monitor about such matters as are specified in the exemption or are of a description so specified,
 - (b) except to the extent that Monitor otherwise approves, to do, or not to do, such things as are specified in the exemption or are of a description so specified (or to do, or not to do, such things in a specified manner), and
 - (c) to refer for determination by Monitor such questions arising under the exemption as are specified in the exemption or are of a description so specified.
- (4) Before making exemption regulations the Secretary of State must give notice to—
- (a) Monitor,
 - (b) the National Health Service Commissioning Board, and
 - (c) the Care Quality Commission and its Healthwatch England committee.
- (5) The Secretary of State must also publish a notice under subsection (4).
- (6) A notice under subsection (4) must—
- (a) state that the Secretary of State proposes to make exemption regulations and set out their proposed effect,
 - (b) set out the Secretary of State’s reasons for the proposal, and
 - (c) specify the period (“the notice period”) within which representations with respect to the proposal may be made.
- (7) The notice period must be not less than 28 days beginning with the day after that on which the notice is published under subsection (5).
- (8) Where an exemption is granted the Secretary of State—
- (a) if the exemption is granted to a prescribed person, must give notice of it to that person, and
 - (b) must publish the exemption.

84 Exemption regulations: supplementary

- (1) Regulations may revoke exemption regulations by which an exemption was granted to a person, or amend such regulations by which more than one exemption was so granted so as to withdraw any of the exemptions—
- (a) at the person’s request,
 - (b) in accordance with any provision of the exemption regulations by which the exemption was granted, or
 - (c) if the Secretary of State considers it to be inappropriate for the exemption to continue to have effect.
- (2) Regulations may revoke exemption regulations by which an exemption was granted to persons of a prescribed description, or amend such regulations by which more than one exemption was so granted so as to withdraw any of the exemptions—

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- (a) in accordance with any provision of the exemption regulations by which the exemption was granted, or
 - (b) if the Secretary of State considers it to be inappropriate for the exemption to continue to have effect.
- (3) The Secretary of State may by direction withdraw an exemption granted to persons of a description prescribed in exemption regulations for any person of that description—
- (a) at the person’s request,
 - (b) in accordance with any provision of the exemption regulations by which the exemption was granted, or
 - (c) if the Secretary of State considers it to be inappropriate for the exemption to continue to have effect in the case of the person.
- (4) Subsection (5) applies where the Secretary of State proposes to—
- (a) make regulations under subsection (1)(b) or (c) or (2), or
 - (b) give a direction under subsection (3)(b) or (c).
- (5) The Secretary of State must—
- (a) consult the following about the proposal—
 - (i) Monitor;
 - (ii) the National Health Service Commissioning Board;
 - (iii) the Care Quality Commission and its Healthwatch England committee;
 - (b) where the Secretary of State is proposing to make regulations under subsection (1)(b) or (c), give notice of the proposal to the person to whom the exemption was granted;
 - (c) where the Secretary of State is proposing to make regulations under subsection (2), publish the notice;
 - (d) where the Secretary of State is proposing to give a direction under subsection (3)(b) or (c), give notice of the proposal to the person from whom the Secretary of State proposes to withdraw the exemption.
- (6) The notice must—
- (a) state that the Secretary of State proposes to make the regulations or give the direction (as the case may be),
 - (b) set out the Secretary of State’s reasons for the proposal, and
 - (c) specify the period within which representations with respect to the proposal may be made.
- (7) The period so specified must be not less than 28 days beginning with the day after that on which the notice is received or (as the case may be) published.

Licensing procedure

85 Application for licence

- (1) A person seeking to hold a licence under this Chapter must make an application to Monitor.
- (2) The application must be made in such form, and contain or be accompanied by such information, as Monitor requires.

86 Licensing criteria

- (1) Monitor must set and publish the criteria which must be met by a person in order for that person to be granted a licence under this Chapter.
- (2) Monitor may revise the criteria and, if it does so, must publish them as revised.
- (3) Monitor may not set or revise the criteria unless the Secretary of State has by order approved the criteria or (as the case may be) revised criteria.

87 Grant or refusal of licence

- (1) This section applies where an application for a licence has been made under section 85.
- (2) If Monitor is satisfied that the applicant meets the criteria for holding a licence for the time being published under section 86 it must as soon as reasonably practicable grant the application; otherwise it must refuse it.
- (3) On granting the application, Monitor must issue a licence to the applicant.
- (4) A licence issued under this section is subject to—
 - (a) such of the standard conditions (see section 94) as are applicable to the licence,
 - (b) such other conditions included in the licence by virtue of section 95 (referred to in this Chapter as “the special conditions”), and
 - (c) any conditions included in the licence by virtue of section 111 (imposition of licence conditions on NHS foundation trusts during transitional period).

88 Application and grant: NHS foundation trusts

- (1) This section applies where an NHS trust becomes an NHS foundation trust pursuant to section 36 of the National Health Service Act 2006 (effect of authorisation of NHS foundation trust).
- (2) The NHS foundation trust is to be treated by Monitor as having—
 - (a) duly made an application for a licence under section 85, and
 - (b) met the criteria for holding a licence for the time being published under section 86.
- (3) An NHS foundation trust in existence on the day on which this section comes into force is to be treated for the purposes of this section as having become an NHS foundation trust pursuant to section 36 of the National Health Service Act 2006 on that day.

89 Revocation of licence

Monitor may at any time revoke a licence under this Chapter—

- (a) on the application of the licence holder, or
- (b) if Monitor is satisfied that the licence holder has failed to comply with a condition of the licence.

90 Right to make representations

- (1) Monitor must give notice—

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- (a) to an applicant for a licence under this Chapter of a proposal to refuse the application;
 - (b) to the licence holder of a proposal to revoke a licence under section 89(b).
- (2) A notice under this section must—
- (a) set out Monitor’s reasons for its proposal;
 - (b) specify the period within which representations with respect to the proposal may be made to Monitor.
- (3) The period so specified must be not less than 28 days beginning with the day after that on which the notice is received.

91 Notice of decisions

- (1) This section applies if Monitor decides to—
- (a) refuse an application for a licence under section 87, or
 - (b) revoke a licence under section 89(b).
- (2) Monitor must give notice of its decision to the applicant or the licence holder (as the case may be).
- (3) A notice under this section must explain the right of appeal conferred by section 92.
- (4) A decision of Monitor to revoke a licence under section 89(b) takes effect on such day as may be specified by Monitor, being a day no earlier than—
- (a) if an appeal is brought under section 92, the day on which the decision on appeal is confirmed or the appeal is abandoned,
 - (b) where the licence holder notifies Monitor before the end of the period for bringing an appeal under section 92 that the licence holder does not intend to appeal, the day on which Monitor receives the notification, or
 - (c) the day after that period.

92 Appeals to the Tribunal

- (1) An appeal lies to the First-tier Tribunal against a decision of Monitor to—
- (a) refuse an application for a licence under section 87, or
 - (b) revoke a licence under section 89(b).
- (2) The grounds for an appeal under this section are that the decision was—
- (a) based on an error of fact,
 - (b) wrong in law, or
 - (c) unreasonable.
- (3) On an appeal under this section, the First-tier Tribunal may—
- (a) confirm Monitor’s decision,
 - (b) direct that the decision is not to have effect, or
 - (c) remit the decision to Monitor.

93 Register of licence holders

- (1) Monitor must maintain and publish a register of licence holders.

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- (2) The register may contain such information as Monitor considers appropriate for the purpose of keeping members of the public informed about licence holders including, in particular, information about the revocation of any licence under this Chapter.
- (3) Monitor must secure that copies of the register are available at its offices for inspection at all reasonable times by any person.
- (4) Any person who asks Monitor for a copy of, or an extract from, the register is entitled to have one.
- (5) Regulations may provide that subsections (3) and (4) do not apply—
 - (a) in such circumstances as may be prescribed, or
 - (b) to such parts of the register as may be prescribed.
- (6) A fee determined by Monitor is payable for the copy or extract except—
 - (a) in such circumstances as may be prescribed, or
 - (b) in any case where Monitor considers it appropriate to provide the copy or extract free of charge.

Licence conditions

94 Standard conditions

- (1) Monitor must determine and publish the conditions to be included in each licence under this Chapter (referred to in this Chapter as “the standard conditions”).
- (2) Different standard conditions may be determined for different descriptions of licences.
- (3) For the purposes of subsection (2) a description of licences may, in particular, be framed wholly or partly by reference to—
 - (a) the nature of the licence holder,
 - (b) the services provided under the licence, or
 - (c) the areas in which those services are provided.
- (4) But different standard conditions must not be determined for different descriptions of licences to the extent that the description is framed by reference to the nature of the licence holder unless Monitor considers that at least one of requirements 1 and 2 is met.
- (5) Requirement 1 is that—
 - (a) the standard conditions in question relate to the governance of licence holders, and
 - (b) it is necessary to determine different standard conditions in order to take account of differences in the status of different licence holders.
- (6) Requirement 2 is that it is necessary to determine different standard conditions for the purpose of ensuring that the burdens to which different licence holders are subject as a result of holding a licence are broadly consistent.
- (7) Before determining the first set of the standard conditions Monitor must consult the persons mentioned in subsection (8) on the conditions it is proposing to determine (“the draft standard conditions”).
- (8) Those persons are—

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- (a) the Secretary of State,
 - (b) the NHS Commissioning Board Authority,
 - (c) every Primary Care Trust,
 - (d) the Care Quality Commission, and
 - (e) such other persons as are likely to be affected by the inclusion of the conditions in licences under this Chapter as Monitor considers appropriate.
- (9) Monitor must also publish the draft standard conditions.
- (10) The Secretary of State may direct Monitor not to determine that the standard conditions will be the draft standard conditions.
- (11) If, at the time Monitor discharges the function under subsection (7), the day specified by the Secretary of State for the purposes of section 14A of the National Health Service Act 2006 has passed or section 9 or 181 has come into force—
- (a) in the case of section 14A of the National Health Service Act 2006, the reference in subsection (8)(c) to every Primary Care Trust is to be read as a reference to every clinical commissioning group;
 - (b) in the case of section 9, the reference in subsection (8)(b) to the NHS Commissioning Board Authority is to be read as a reference to the National Health Service Commissioning Board;
 - (c) in the case of section 181, the reference in subsection (8)(d) to the Care Quality Commission is to be read as including a reference to its Healthwatch England committee.

95 Special conditions

- (1) Monitor may—
- (a) with the consent of the applicant, include a special condition in a licence under this Chapter, and
 - (b) with the consent of the licence holder, modify a special condition of a licence.
- (2) Before including a special condition or making such modifications Monitor must give notice to—
- (a) the applicant or the licence holder (as the case may be),
 - (b) the Secretary of State,
 - (c) the National Health Service Commissioning Board,
 - (d) such clinical commissioning groups as are likely to be affected by the proposed inclusion or modifications, and
 - (e) the Care Quality Commission and its Healthwatch England committee.
- (3) Monitor must also publish the notice under subsection (2).
- (4) The notice under subsection (2) must—
- (a) state that Monitor proposes to include the special condition or make the modifications and set out its or their proposed effect,
 - (b) set out Monitor’s reasons for the proposal, and
 - (c) specify the period (“the notice period”) within which representations with respect to the proposal may be made to Monitor.
- (5) The notice period must be not less than 28 days beginning with the day after that on which the notice is published under subsection (3).

- (6) In this section, a reference to modifying a condition includes a reference to amending, omitting or adding a condition.

96 Limits on Monitor’s functions to set or modify licence conditions

- (1) This section applies to the following functions of Monitor—
- (a) the duty to determine the standard conditions to be included in each licence under this Chapter or in licences of a particular description (see section 94);
 - (b) the powers to include a special condition in a licence and to modify such a condition (see section 95);
 - (c) the power to modify the standard conditions applicable to all licences, or to licences of a particular description (see section 100).
- (2) Monitor may only exercise a function to which this section applies—
- (a) for the purpose of regulating the price payable for the provision of health care services for the purposes of the NHS;
 - (b) for the purpose of preventing anti-competitive behaviour in the provision of health care services for those purposes which is against the interests of people who use such services;
 - (c) for the purpose of protecting and promoting the right of patients to make choices with respect to treatment or other health care services provided for the purposes of the NHS;
 - (d) for the purpose of ensuring the continued provision of health care services for the purposes of the NHS;
 - (e) for the purpose of enabling health care services provided for the purposes of the NHS to be provided in an integrated way where Monitor considers that this would achieve one or more of the objectives referred to in subsection (3);
 - (f) for the purpose of enabling the provision of health care services provided for the purposes of the NHS to be integrated with the provision of health-related services or social care services where Monitor considers that this would achieve one or more of the objectives referred to in subsection (3);
 - (g) for the purpose of enabling co-operation between providers of health care services for the purposes of the NHS where Monitor considers that this would achieve one or more of the objectives referred to in subsection (3);
 - (h) for purposes connected with the governance of persons providing health care services for the purposes of the NHS;
 - (i) for purposes connected with Monitor’s functions in relation to the register of NHS foundation trusts required to be maintained under section 39 of the National Health Service Act 2006;
 - (j) for purposes connected with the operation of the licensing regime established by this Chapter;
 - (k) for such purposes as may be prescribed for the purpose of enabling Monitor to discharge its duties under section 62.
- (3) The objectives referred to in subsection (2)(e), (f) and (g) are—
- (a) improving the quality of health care services provided for the purposes of the NHS (including the outcomes that are achieved from their provision) or the efficiency of their provision,
 - (b) reducing inequalities between persons with respect to their ability to access those services, and

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- (c) reducing inequalities between persons with respect to the outcomes achieved for them by the provision of those services.
- (4) Monitor must not exercise a function to which this section applies in a way which it considers would result in a particular licence holder or holders of licences of a particular description being put at an unfair advantage or disadvantage in competing with others in the provision of health care services for the purposes of the NHS as a result of—
 - (a) being in the public or (as the case may be) private sector, or
 - (b) some other aspect of its or their status.
- (5) In subsection (2)(f), “health-related services” and “social care services” each have the meaning given in section 62(11).

97 **Conditions: supplementary**

- (1) The standard or special conditions of a licence under this Chapter may, in particular, include conditions—
 - (a) requiring the licence holder to pay to Monitor such fees of such amounts as Monitor may determine in respect of the exercise by Monitor of its functions under this Chapter,
 - (b) requiring the licence holder to comply with any requirement imposed on it by Monitor under Chapter 6 (financial assistance in special administration cases),
 - (c) requiring the licence holder to do, or not to do, specified things or things of a specified description (or to do, or not to do, any such things in a specified manner) within such period as may be specified in order to prevent anti-competitive behaviour in the provision of health care services for the purposes of the NHS which is against the interests of people who use such services,
 - (d) requiring the licence holder to give notice to the Office of Fair Trading before entering into an arrangement under which, or a transaction in consequence of which, the licence holder’s activities, and the activities of one or more other businesses, cease to be distinct activities,
 - (e) requiring the licence holder to provide Monitor with such information as Monitor considers necessary for the purposes of the exercise of its functions under this Part,
 - (f) requiring the licence holder to publish such information as may be specified or as Monitor may direct,
 - (g) requiring the licence holder to charge for the provision of health care services for the purposes of the NHS in accordance with the national tariff (see section 116),
 - (h) requiring the licence holder to comply with other rules published by Monitor about the charging for the provision of health care services for the purposes of the NHS,
 - (i) requiring the licence holder—
 - (i) to do, or not to do, specified things or things of a specified description (or to do, or not to do, any such things in a specified manner) within such period as may be specified in order to ensure the continued provision of one or more of the health care services that the licence holder provides for the purposes of the NHS,

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- (ii) to give Monitor notice (of such period as may be determined by or under the licence) of the licence holder’s intention to cease providing a health care service for the purposes of the NHS, and
 - (iii) if Monitor so directs, to continue providing that service for a period determined by Monitor,
 - (j) about the use or disposal by the licence holder of assets used in the provision of health care services for the purposes of the NHS in order to ensure the continued provision of one or more of the health care services that the licence holder provides for those purposes, and
 - (k) about the making by the licence holder of investment in relation to the provision of health care services for the purposes of the NHS in order to ensure the continued provision of one or more of the health care services that the licence holder provides for those purposes.
- (2) In subsection (1) “specified” means specified in a condition.
- (3) Monitor must not include a condition under subsection (1)(c) that requires the licence holder (A) to provide another licence holder with access to facilities of A.
- (4) A condition under subsection (1)(d)—
 - (a) may be included only in the licence of an NHS foundation trust or a body which (or part of which) used to be an NHS trust established under section 25 of the National Health Service Act 2006, and
 - (b) ceases to have effect at the end of the period of five years beginning with the day on which it is included in the licence.
- (5) The references in subsection (1)(d) to the activities of a licence holder or other business include a reference to part of the activities concerned.
- (6) The references in subsections (1)(d) and (5) to the activities of a business include a reference to the activities of an NHS foundation trust in so far as its activities would not otherwise be the activities of a business.
- (7) A condition of a licence under this Chapter may provide that it is to have effect, or cease to have effect, at such times and in such circumstances as may be determined by or under the conditions.

98 Conditions relating to the continuation of the provision of services etc.

- (1) The things which a licence holder may be required to do by a condition under section 97(1)(i)(i) include, in particular—
 - (a) providing information to the commissioners of services to which the condition applies and to such other persons as Monitor may direct,
 - (b) allowing Monitor to enter premises owned or controlled by the licence holder and to inspect the premises and anything on them, and
 - (c) co-operating with such persons as Monitor may appoint to assist in the management of the licence holder’s affairs, business and property.
- (2) A commissioner of services to which a condition under section 97(1)(i), (j) or (k) applies must co-operate with persons appointed under subsection (1)(c) in their provision of the assistance that they have been appointed to provide.

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- (3) Where a licence includes a condition under section 97(1)(i), (j) or (k), Monitor must carry out an ongoing assessment of the risks to the continued provision of services to which the condition applies.
- (4) Monitor must publish guidance—
 - (a) for commissioners of a service to which a condition under section 97(1)(i), (j) or (k) applies about the exercise of their functions in connection with the licence holders who provide the service, and
 - (b) for such licence holders about the conduct of their affairs, business and property at a time at which such a condition applies.
- (5) A commissioner of services to which a condition under section 97(1)(i), (j), or (k) applies must have regard to guidance under subsection (4)(a).
- (6) Monitor may revise guidance under subsection (4) and, if it does so, must publish the guidance as revised.
- (7) Before publishing guidance under subsection (4) or (6), Monitor must obtain the approval of—
 - (a) the Secretary of State, and
 - (b) the National Health Service Commissioning Board.

99 Notification of commissioners where continuation of services at risk

- (1) This section applies where Monitor—
 - (a) takes action in the case of a licence holder in reliance on a condition in the licence under section 97(1)(i), (j) or (k), and
 - (b) does so because it is satisfied that the continued provision for the purposes of the NHS of health care services to which that condition applies is being put at significant risk by the configuration of certain health care services provided for those purposes.
- (2) In subsection (1), a reference to the provision of services is a reference to their provision by the licence holder or any other provider.
- (3) Monitor must as soon as reasonably practicable notify the National Health Service Commissioning Board and such clinical commissioning groups as Monitor considers appropriate—
 - (a) of the action it has taken, and
 - (b) of its reasons for being satisfied as mentioned in subsection (1)(b).
- (4) Monitor must publish for each financial year a list of the notifications under this section that it has given during that year; and the list must include for each notification a summary of Monitor's reasons for being satisfied as mentioned in subsection (1)(b).
- (5) The Board and clinical commissioning groups, having received a notification under this section, must have regard to it in arranging for the provision of health care services for the purposes of the NHS.

100 Modification of standard conditions

- (1) Monitor may, subject to the requirements of this section, modify the standard conditions applicable to all licences under this Chapter or to licences of a particular description.
- (2) Before making any such modifications Monitor must give notice to—
 - (a) each relevant licence holder,
 - (b) the Secretary of State,
 - (c) the National Health Service Commissioning Board,
 - (d) every clinical commissioning group, and
 - (e) the Care Quality Commission and its Healthwatch England committee.
- (3) Monitor must also publish the notice under subsection (2).
- (4) The notice under subsection (2) must—
 - (a) state that Monitor proposes to make the modifications,
 - (b) set out the proposed effect of the modifications,
 - (c) set out Monitor’s reasons for the proposal, and
 - (d) specify the period (“the notice period”) within which representations with respect to the proposal may be made to Monitor.
- (5) The notice period must be not less than 28 days beginning with the day after that on which the notice is published under subsection (3).
- (6) Monitor may not make any modifications under this section unless—
 - (a) no relevant licence holder has made an objection to Monitor about the proposal within the notice period, or
 - (b) subsection (7) applies to the case.
- (7) This subsection applies where—
 - (a) one or more relevant licence holders make an objection to Monitor about the proposal within the notice period,
 - (b) the objection percentage is less than the percentage prescribed for the purposes of this paragraph, and
 - (c) the share of supply percentage is less than the percentage prescribed for the purposes of this paragraph.
- (8) In subsection (7)—
 - (a) the “objection percentage” is the proportion (expressed as a percentage) of the relevant licence holders who objected to the proposals;
 - (b) the “share of supply percentage” is the proportion (expressed as a percentage) of the relevant licence holders who objected to the proposals, weighted according to their share of the supply in England of such services as may be prescribed.
- (9) Regulations prescribing a percentage for the purposes of subsection (7)(c) may include provision prescribing the method to be used for determining a licence holder’s share of the supply in England of the services concerned.
- (10) Where Monitor modifies the standard conditions applicable to all licences or (as the case may be) to licences of a particular description under this section, Monitor—

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- (a) may also make such incidental or consequential modifications as it considers necessary or expedient of any other conditions of a licence which is affected by the modifications,
 - (b) must make (as nearly as may be) the same modifications of those conditions for the purposes of their inclusion in all licences or (as the case may be) licences of that description granted after that time, and
 - (c) must publish the modifications.
- (11) In this section and section 101, “relevant licence holder”—
- (a) in relation to proposed modifications of the standard conditions applicable to all licences, means any licence holder, and
 - (b) in relation to proposed modifications of the standard conditions applicable to licences of a particular description, means a holder of a licence of that description.
- (12) In this section, a reference to modifying a condition includes a reference to amending, omitting or adding a condition.

101 Modification references to the Competition Commission

- (1) Subsection (2) applies where—
- (a) Monitor has given notice under section 95(2) of a proposal to include a special condition in a licence or modify such a condition, and
 - (b) the applicant or (as the case may be) licence holder concerned has refused consent to the inclusion of the condition or the making of the modifications.
- (2) Monitor may make a reference to the Competition Commission which is so framed as to require the Commission to investigate and report on the questions—
- (a) whether any matters which relate to the provision, or proposed provision, of a health care service for the purposes of the NHS by the applicant or (as the case may be) licence holder concerned and which are specified in the reference, operate, or may be expected to operate, against the public interest, and
 - (b) if so, whether the effects adverse to the public interest which those matters have or may be expected to have could be remedied or prevented by the inclusion of a special condition in the applicant’s licence or by modifications of a special condition of the licence holder’s licence.
- (3) Subsection (4) applies where—
- (a) Monitor has given notice under section 100(2) of a proposal to make modifications to the standard conditions applicable to all licences under this Chapter, or to licences of a particular description, and
 - (b) section 100 operates to prevent Monitor from making the modifications.
- (4) Monitor may make a reference to the Competition Commission which is so framed as to require the Commission to investigate and report on the questions—
- (a) whether any matters which relate to the provision of health care services for the purposes of the NHS by the relevant licence holders, and which are specified in the reference, operate, or may be expected to operate, against the public interest, and
 - (b) if so, whether the effects adverse to the public interest which those matters have or may be expected to have could be remedied or prevented by

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modifications of the standard conditions applicable to all licences under this Chapter, or to licences of a particular description.

- (5) Schedule 10 (which makes further provision about references to the Competition Commission) has effect in relation to a reference under subsection (2) or (4); and, for that purpose, the relevant persons are—
- (a) in paragraphs 3, 6(6) and 7(6)—
 - (i) the applicant or licence holder concerned or (as the case may be) relevant licence holders,
 - (ii) the National Health Service Commissioning Board, and
 - (iii) such clinical commissioning groups as are likely to be affected by matters to which the reference relates,
 - (b) in paragraph 5(6), the applicant or licence holder concerned or (as the case may be) relevant licence holders, and
 - (c) in paragraph 8(10)—
 - (i) the applicant or licence holder concerned or (as the case may be) relevant licence holders,
 - (ii) Monitor,
 - (iii) the National Health Service Commissioning Board, and
 - (iv) such clinical commissioning groups as are likely to be affected by the proposal concerned.
- (6) In investigating the question under subsection (2)(a) or (4)(a) the Competition Commission must have regard to—
- (a) the matters in respect of which Monitor has duties under section 62, and
 - (b) the matters to which Monitor must have regard by virtue of section 66.
- (7) Where the standard conditions applicable to all licences or (as the case may be) to licences of a particular description are modified pursuant to a reference made under subsection (4), Monitor—
- (a) may also make such incidental or consequential modifications as it considers necessary or expedient of any other conditions of a licence which is affected by the modifications,
 - (b) must make (as nearly as may be) the same modifications of those conditions for the purposes of their inclusion in all licences or (as the case may be) licences of that description granted after that time, and
 - (c) must publish any modifications made under this subsection.
- (8) In this section, a reference to modifying a condition includes a reference to amending, omitting or adding a condition.

102 Modification of conditions by order under other enactments

- (1) This section applies where the Office of Fair Trading, Competition Commission or Secretary of State (the “relevant authority”) makes a relevant order.
- (2) A relevant order may modify—
- (a) the conditions of a particular licence, or
 - (b) the standard conditions applicable to all licences under this Chapter or to licences of a particular description.

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- (3) The modifications which may be made by a relevant order are those which the relevant authority considers necessary or expedient for the purpose of giving effect to, or taking account of, any provision made by the order.
- (4) In this section “relevant order” means—
- (a) an order under section 75, 83 or 84 of, or paragraph 5, 10 or 11 of Schedule 7 to, the Enterprise Act 2002 where one or more of the enterprises which have, or may have, ceased to be distinct enterprises were engaged in the provision of health care services for the purposes of the NHS;
 - (b) an order under any of those provisions of that Act where one or more of the enterprises which will or may cease to be distinct enterprises is engaged in the provision of health care services for the purposes of the NHS;
 - (c) an order under section 160 or 161 of that Act where the feature, or combination of features, of the market in the United Kingdom for goods or services which prevents, restricts or distorts competition relates to—
 - (i) the commissioning by the National Health Service Commissioning Board or a clinical commissioning group of health care services for the purposes of the NHS, or
 - (ii) the provision of those services.
- (5) The modification under subsection (2)(a) of part of a standard condition of a licence does not prevent any other part of the condition from continuing to be regarded as a standard condition for the purposes of this Chapter.
- (6) Where the relevant authority modifies the standard conditions applicable to all licences or (as the case may be) to licences of a particular description under this section, the relevant authority—
- (a) may, after consultation with Monitor, make such incidental or consequential modifications as the relevant authority considers necessary or expedient of any other conditions of any licence which is affected by the modifications,
 - (b) must also make (as nearly as may be) the same modifications of those conditions for the purposes of their inclusion in all licences or (as the case may be) licences of that description granted after that time, and
 - (c) must publish any modifications it makes under paragraph (b).
- (7) Expressions used in subsection (4) and in Part 3 or (as the case may be) Part 4 of the Enterprise Act 2002 have the same meaning in that subsection as in that Part.
- (8) In this section, a reference to modifying a condition includes a reference to amending, omitting or adding a condition.

103 Standard condition as to transparency of certain criteria

- (1) The standard conditions applicable to any licence under this Chapter must include a condition requiring the licence holder to—
- (a) set transparent eligibility and selection criteria, and
 - (b) apply those criteria in a transparent way to persons who, having a choice of persons from whom to receive health care services for the purposes of the NHS, choose to receive them from the licence holder.
- (2) “Eligibility and selection criteria”, in relation to a licence holder, means criteria for determining—

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- (a) whether a person is eligible, or is to be selected, to receive health care services provided by the licence holder for the purposes of the NHS, and
 - (b) if the person is selected, the manner in which the services are provided to the person.
- (3) The following powers must not be exercised so as to omit the condition mentioned in subsection (1) from any licence under this Chapter—
- (a) the powers conferred on Monitor by sections 100, 101(7) and paragraph 7(2) of Schedule 10 to modify the standard conditions applicable to all licences, or to licences of a particular description,
 - (b) the power conferred on the Competition Commission by paragraph 8(5) of that Schedule to modify those conditions, and
 - (c) the powers conferred by section 102 on the Office of Fair Trading, Competition Commission and Secretary of State to modify those conditions or the conditions of a particular licence.

Enforcement

104 Power to require documents and information

- (1) Monitor may require a person mentioned in subsection (2) to provide it with any information, documents, records or other items which it considers it necessary or expedient to have for the purposes of any of its regulatory functions.
- (2) The persons are—
- (a) an applicant for a licence under this Chapter,
 - (b) a licence holder,
 - (c) a person who has provided, or is providing, a health care service for the purposes of the NHS in accordance with an exemption by virtue of section 83 from the requirement to hold a licence under this Chapter,
 - (d) a person who has provided, or is providing, a health care service for the purposes of the NHS in breach of that requirement,
 - (e) the National Health Service Commissioning Board, and
 - (f) a clinical commissioning group.
- (3) The power in subsection (1) includes, in relation to information, documents or records kept by means of a computer, power to require the provision of the information, documents or records in legible form.
- (4) For the purposes of subsection (1) Monitor’s regulatory functions are its functions under—
- (a) this Chapter,
 - (b) Chapters 4 to 6,
 - (c) Chapter 5 of Part 2 of the National Health Service Act 2006 (NHS foundation trusts), and
 - (d) Chapter 5A of that Part of that Act (trust special administration).

105 Discretionary requirements

- (1) Monitor may impose one or more discretionary requirements on a person if Monitor is satisfied that the person—

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- (a) has provided, or is providing, a health care service for the purposes of the NHS in breach of the requirement to hold a licence under this Chapter (see section 81),
 - (b) is a licence holder who has provided, or is providing, a health care service for the purposes of the NHS in breach of a condition of the licence, or
 - (c) is in breach of a requirement imposed by Monitor under section 104.
- (2) In this Chapter, “discretionary requirement” means—
- (a) a requirement to pay a monetary penalty to Monitor of such amount as Monitor may determine (referred to in this Chapter as a “variable monetary penalty”),
 - (b) a requirement to take such steps within such period as Monitor may specify, to secure that the breach in question does not continue or recur (referred to in this Chapter as a “compliance requirement”), or
 - (c) a requirement to take such steps within such period as Monitor may specify, to secure that the position is, so far as possible, restored to what it would have been if the breach in question was not occurring or had not occurred (referred to in this Chapter as a “restoration requirement”).
- (3) Monitor must not impose discretionary requirements on a person on more than one occasion in relation to the same breach.
- (4) A variable monetary penalty must not exceed 10% of the turnover in England of the person on whom it is imposed, such amount to be calculated in the prescribed manner.
- (5) If the whole or any part of a variable monetary penalty is not paid by the time it is required to be paid, the unpaid balance from time to time carries interest at the rate for the time being specified in section 17 of the Judgments Act 1838; but the total interest must not exceed the amount of the penalty.

106 Enforcement undertakings

- (1) Monitor may accept an enforcement undertaking from a person if Monitor has reasonable grounds to suspect that the person—
- (a) has provided, or is providing, a health care service for the purposes of the NHS in breach of the requirement to hold a licence under this Chapter,
 - (b) is a licence holder who has provided, or is providing, a health care service for the purposes of the NHS in breach of a condition of the licence, or
 - (c) is in breach of a requirement imposed by Monitor under section 104.
- (2) In this Chapter, “enforcement undertaking” means an undertaking from a person to take such action of a kind mentioned in subsection (3) as may be specified in the undertaking within such period as may be so specified.
- (3) The specified action must be—
- (a) action to secure that the breach in question does not continue or recur,
 - (b) action to secure that the position is, so far as possible, restored to what it would have been if the breach in question was not occurring or had not occurred,
 - (c) action (including the payment of a sum of money) to benefit—
 - (i) any other licence holder affected by the breach, or
 - (ii) any commissioner of health care services for the purposes of the NHS which is affected by the breach, or
 - (d) action of such a description as may be prescribed.

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- (4) Where Monitor accepts an enforcement undertaking then, unless the person from whom the undertaking is accepted has failed to comply with the undertaking or any part of it—
 - (a) Monitor may not impose on that person any discretionary requirement which it would otherwise have power to impose by virtue of section 105 in respect of the breach to which the undertaking relates, and
 - (b) if the breach to which the undertaking relates falls within subsection (1)(b), Monitor may not revoke that person’s licence under section 89(b).
- (5) Where a person from whom Monitor has accepted an enforcement undertaking has failed to comply fully with the undertaking but has complied with part of it, Monitor must take the partial compliance into account in deciding whether—
 - (a) to impose a discretionary requirement on the person in respect of the breach to which the undertaking relates, or
 - (b) if the breach to which the undertaking relates falls within subsection (1)(b), to revoke the person’s licence under section 89(b).

107 Further provision about enforcement powers

Schedule 11 (Part 1 of which makes further provision about discretionary requirements and Part 2 of which makes further provision about enforcement undertakings) has effect.

108 Guidance as to use of enforcement powers

- (1) Monitor must publish guidance about how it intends to exercise its functions under sections 105 and 106 and Schedule 11.
- (2) Monitor may revise the guidance and, if it does so, must publish the guidance as revised.
- (3) Monitor must consult such persons as it considers appropriate before publishing or revising the guidance.
- (4) Guidance relating to Monitor’s functions under section 105 must include information about—
 - (a) the circumstances in which Monitor is likely to impose a discretionary requirement,
 - (b) the circumstances in which Monitor may not impose a discretionary requirement,
 - (c) the matters likely to be taken into account by Monitor in determining the amount of any variable monetary penalty to be imposed (including, where relevant, any discounts for voluntary reporting of breaches in respect of which a penalty may be imposed), and
 - (d) rights to make representations and rights of appeal.
- (5) Monitor must have regard to the guidance or (as the case may be) revised guidance in exercising its functions under sections 105 and 106 and Schedule 11.

109 Publication of enforcement action

- (1) Monitor must include information about the following in its annual report—

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- (a) the cases in which a discretionary requirement has been imposed during the financial year to which the report relates, and
 - (b) the cases in which an enforcement undertaking has been accepted during that financial year.
- (2) But Monitor must not include information which it is satisfied is—
- (a) commercial information the disclosure of which would, or might, significantly harm the legitimate business interests of the person to whom it relates;
 - (b) information relating to the private affairs of an individual the disclosure of which would, or might, significantly harm that person’s interests.
- (3) The reference in subsection (1)(a) to cases in which a discretionary requirement has been imposed does not include a reference to a case where a discretionary requirement has been imposed but overturned on appeal.

110 Notification of enforcement action

- (1) As soon as reasonably practicable after imposing a discretionary requirement or accepting an enforcement undertaking Monitor must notify the following of that fact—
- (a) the National Health Service Commissioning Board,
 - (b) such clinical commissioning groups as are likely to be affected by the imposition of the requirement or the acceptance of the undertaking, and
 - (c) any person exercising regulatory functions in relation to the person on whom the discretionary requirement was imposed or from whom the enforcement undertaking was accepted.
- (2) In subsection (1) “regulatory functions” has the same meaning as in the Legislative and Regulatory Reform Act 2006 (see section 32 of that Act).

Transitional provision

111 Imposition of licence conditions on NHS foundation trusts

- (1) Where Monitor is satisfied that the governance of an NHS foundation trust is such that the trust will fail to comply with the conditions of its licence, Monitor may include in the licence such conditions relating to governance as it considers appropriate for the purpose of reducing that risk.
- (2) The circumstances in which Monitor may be satisfied as mentioned in subsection (1) include circumstances where it is satisfied that the council of governors, the board of directors or the council of governors and board of directors taken together are failing—
- (a) to secure compliance with conditions in the trust’s licence, or
 - (b) to take steps to reduce the risk of a breach of a condition in the trust’s licence.
- (3) A condition included under subsection (1) has effect until this section ceases, by virtue of section 112, to have effect in relation to the trust.
- (4) Monitor may modify a condition included under subsection (1).
- (5) Where Monitor is satisfied that the trust has breached or is breaching a condition included under subsection (1), Monitor may by notice require the trust to—
- (a) remove one or more of the directors or members of the council of governors and appoint interim directors or members of the council;

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- (b) suspend one or more of the directors or members of the council from office as a director or member for a specified period;
 - (c) disqualify one or more of the directors or members of the council from holding office as a director or member for a specified period.
- (6) Where Monitor is satisfied that a person has failed or is failing to comply with a notice under subsection (5), Monitor may do one or more of the things which it may require the trust to do under that subsection.
- (7) Subsection (5) does not prevent Monitor from exercising in relation to a condition included in a licence under subsection (1) the powers conferred by sections 105 and 106 (breach of licence condition etc: enforcement powers which apply during and after period in which this section and sections 112 to 114 have effect).
- (8) Where Monitor includes a condition under subsection (1), it may also make such incidental or consequential modifications as it considers necessary or expedient of any other condition of the licence concerned which is affected.
- (9) Where Monitor includes a condition under subsection (1) by modifying a standard condition of the licence concerned, the modification does not prevent any other part of the condition from continuing to be regarded as a standard condition for the purposes of this Chapter.
- (10) In this section, a reference to failing to discharge functions includes a reference to failing to discharge those functions properly.
- (11) Omit section 52 of the National Health Service Act 2006 (failing NHS foundation trusts); and in consequence of that, omit—
- (a) section 39(2)(f) of that Act (copy of notice under section 52 of that Act to be on register), and
 - (b) paragraph 22(1)(f) of Schedule 7 to that Act (copy of that notice to be available for public inspection).

112 Duration of transitional period

- (1) Section 111 ceases to have effect in relation to an NHS foundation trust on such day as the Secretary of State may by order specify.
- (2) Different days may be appointed in relation to different NHS foundation trusts.
- (3) A day specified under subsection (1) must not—
- (a) in the case of an NHS foundation trust authorised on or before 1 April 2014, be before 1 April 2016;
 - (b) in the case of an NHS foundation trust authorised after 1 April 2014, be before the end of the period of two years beginning with the day on which the trust was authorised.
- (4) In this section, a reference to being authorised is a reference to being given an authorisation under section 35 of the National Health Service Act 2006.
- (5) Section 111 is repealed as soon as there are—
- (a) no NHS foundation trusts in relation to which it has effect, and
 - (b) no NHS trusts in existence (whether because they had all ceased to exist without section 179 having come into force or there are none continuing in existence by virtue of subsection (3) of that section).

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113 Orders under section 112: criteria for deciding applicable trusts

- (1) Where the Secretary of State proposes to make an order under section 112, the Secretary of State must notify Monitor.
- (2) Monitor, having received a notification under subsection (1), must set the criteria that are to be applied for the purpose of determining to which NHS foundation trusts the order should apply.
- (3) Before setting criteria under subsection (2), Monitor must—
 - (a) consult the Care Quality Commission and such other persons as Monitor considers appropriate, and
 - (b) obtain the approval of the Secretary of State.
- (4) If the Secretary of State approves the proposed criteria, Monitor must—
 - (a) publish the criteria,
 - (b) determine, by applying the criteria, to which trusts the order should apply,
 - (c) notify the Secretary of State of its determination, and
 - (d) publish a list of the trusts concerned.
- (5) If the Secretary of State does not approve the proposed criteria, Monitor must propose revised criteria; and subsections (3)(b) and (4) apply in relation to the proposed revised criteria as they apply in relation to the criteria previously proposed.
- (6) The Secretary of State, having received a notification under subsection (4)(c), must review Monitor’s determination under subsection (4)(b).

114 Repeal of sections 112 and 113

- (1) Sections 112 and 113 are repealed immediately after section 111 is repealed; and in consequence of that—
 - (a) in section 67(2)(a), omit “or under sections 111 and 113 of this Act (imposition of licence conditions on NHS foundation trusts during transitional period)”,
 - (b) omit section 67(3),
 - (c) in section 87(4), after paragraph (a) insert “and”, and
 - (d) in section 87(4), omit paragraph (c) and the preceding “and”.
- (2) This section is repealed immediately after sections 112 and 113 are repealed.

CHAPTER 4

PRICING

115 Price payable by commissioners for NHS services

- (1) If a health care service is specified in the national tariff (as to which, see section 116), the price payable for the provision of that service for the purposes of the NHS is (subject to sections 124 and 125) such price as is determined in accordance with the national tariff on the basis of the price (referred to in this Chapter as “the national price”) specified in the national tariff for that service.

- (2) If a health care service is not specified in the national tariff, the price payable for the provision of that service for the purposes of the NHS is such price as is determined in accordance with the rules provided for in the national tariff for that purpose.

116 The national tariff

- (1) Monitor must publish a document, to be known as “the national tariff”, which specifies—
- (a) certain health care services which are or may be provided for the purposes of the NHS,
 - (b) the method used for determining the national prices of those services,
 - (c) the national price of each of those services, and
 - (d) the method used for deciding whether to approve an agreement under section 124 and for determining an application under section 125 (local modifications of prices).
- (2) The national tariff may provide for rules under which the commissioner of a health care service specified in the national tariff and the providers of that service may agree to vary—
- (a) the specification of the service under subsection (1)(a), or
 - (b) the national price of the service.
- (3) Where a variation is agreed in accordance with rules provided for under subsection (2), the commissioner of the service in question must maintain and publish a written statement of—
- (a) the variation, and
 - (b) such other variations as have already been agreed in accordance with rules provided for under that subsection in the case of that service.
- (4) The national tariff may also—
- (a) specify variations to the national price for a service by reference to circumstances in which the service is provided or other factors relevant to the provision of the service,
 - (b) provide for rules for determining the price payable for the provision for the purposes of the NHS of health care services which are not specified under subsection (1)(a), and
 - (c) provide for rules relating to the making of payments to the provider of a health care service for the provision of that service.
- (5) Rules provided for under subsection (4)(b) may specify health care services which are not specified under subsection (1)(a).
- (6) The national tariff may also provide for rules for determining, where a health care service is specified in more than one way under subsection (1)(a) or in more than one way in rules provided for under subsection (4)(b), which specification of the service is to apply in any particular case or cases of any particular description.
- (7) The national tariff may include guidance as to—
- (a) the application of the method specified under subsection (1)(d),
 - (b) the application of rules provided for under subsection (2), (4)(b) or (6),
 - (c) the discharge of the duty imposed by subsection (3), or

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- (d) the application of variations specified under subsection (4)(a), and a commissioner of a health care service for the purposes of the NHS must have regard to guidance under this subsection.
- (8) Different methods may be specified under subsection (1)(b) for different descriptions of health care service.
- (9) The national tariff may, in the case of a specified health care service or health care services of a specified description, specify different national prices or different variations under subsection (4)(a) in relation to different descriptions of provider.
- (10) A description for the purposes of subsection (9) may not be framed by reference to—
 - (a) whether the provider is in the public or (as the case may be) private sector, or
 - (b) some other aspect of the status of the provider.
- (11) The national tariff may not specify a national price for a health care service provided pursuant to the public health functions of the Secretary of State, or of a local authority, under the National Health Service Act 2006.
- (12) The national tariff has effect for such period as is specified in the national tariff (or, where a new edition of the national tariff takes effect before the end of that period, until that new edition takes effect).
- (13) In exercising its functions under this Chapter, Monitor must (in addition to the matters specified in section 66) have regard to the objectives and requirements for the time being specified in the mandate published under section 13A of the National Health Service Act 2006.

117 The national tariff: further provision

- (1) The ways in which a health care service may be specified in the national tariff under section 116(1)(a), or in rules provided for in the national tariff under section 116(4)(b), include in particular—
 - (a) specifying it by reference to its components,
 - (b) specifying it as a service (a “bundle”) that comprises two or more health care services which together constitute a form of treatment,
 - (c) specifying it as a service in a group of standardised services.
- (2) In the case of a service specified in the national tariff under section 116(1)(a), the national tariff must—
 - (a) if the service is specified in accordance with subsection (1)(a), specify a national price for each component of the service;
 - (b) if it is specified in accordance with subsection (1)(b), specify a national price for the bundle;
 - (c) if it is specified in accordance with subsection (1)(c), specify a single price as the national price for each service in the group.
- (3) In the case of a service specified in rules provided for in the national tariff under section 116(4)(b), the rules may—
 - (a) if the service is specified in accordance with subsection (1)(a), make provision for determining the price payable for each component of the service;
 - (b) if it is specified in accordance with subsection (1)(b), make provision for determining the price payable for the bundle;

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- (c) if it is specified in accordance with subsection (1)(c), make provision for determining the price payable for each service in the group.
- (4) Where the commissioner of a health care service for the purposes of the NHS agrees to pay a price for the provision of the service other than the price that is payable by virtue of this Chapter, Monitor may direct the commissioner to take such steps within such period as Monitor may specify to secure that the position is, so far as practicable, restored to what it would have been if the commissioner had agreed to pay the price payable by virtue of this Chapter.
- (5) Where the commissioner of a health care service fails to comply with rules provided for under section 116(2), (4) or (6), Monitor may direct the commissioner to take such steps within such period as Monitor may specify—
 - (a) to secure that the failure does not continue or recur;
 - (b) to secure that the position is, so far as practicable, restored to what it would have been if the failure was not occurring or had not occurred.

118 Consultation on proposals for the national tariff

- (1) Before publishing the national tariff, Monitor must send a notice to—
 - (a) each clinical commissioning group,
 - (b) each relevant provider, and
 - (c) such other persons as it considers appropriate.
- (2) Monitor must also publish the notice.
- (3) The notice must specify—
 - (a) the health care services which Monitor proposes to specify in the national tariff,
 - (b) the method or methods it proposes to use for determining the national prices of those services,
 - (c) the prices, determined in each case by using the applicable method specified under paragraph (b), that Monitor proposes as the national prices of those services, and
 - (d) the method it proposes to use for deciding whether to approve an agreement under section 124 and for determining an application under section 125 (local modifications of national prices).
- (4) The notice may specify such rules as Monitor proposes to provide for in the national tariff under which the commissioner of a health care service and a provider of the service would be entitled to vary—
 - (a) the specification of the service in the national tariff, or
 - (b) the national price of the service.
- (5) The notice may also specify—
 - (a) such variations (by reference to circumstances in which a service is provided or other factors relevant to its provision) as Monitor proposes to specify to the prices that it proposes as the national prices,
 - (b) such rules as Monitor proposes to provide for in the national tariff for determining the price payable for the provision for the purposes of the NHS of health care services not specified for the purposes of subsection (3)(a), and

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- (c) such rules as Monitor proposes to provide for in the national tariff for determining, where a health care service is specified in more than one way for the purposes of subsection (3)(a) or in more than one way in rules specified for the purposes of paragraph (b), which specification of the service is to apply in any particular case or cases of any particular description.
- (6) The notice may include such guidance as Monitor proposes to provide for in the national tariff as to—
 - (a) the application of the method specified for the purposes of subsection (3)(d);
 - (b) the application of rules specified for the purposes of subsection (4) or (5)(b) or (c);
 - (c) the application of variations specified for the purposes of subsection (5)(a).
 - (7) The health care services specified for the purposes of subsection (3)(a) are only such services as the National Health Service Commissioning Board considers should be so specified and—
 - (a) as the Board and Monitor agree will be so specified, or
 - (b) in default of agreement, as are determined by arbitration as being services that will be so specified.
 - (8) A method specified for the purposes of subsection (3)(b) or (d) is only such method, and such guidance on the application of the method specified for the purposes of subsection (3)(d) as is included for the purposes of subsection (6) is only such guidance, as Monitor considers should be so specified and included and—
 - (a) as Monitor and the Board agree will be so specified and included, or
 - (b) in default of agreement, as is determined by arbitration as being the method that will be so specified and the guidance that will be so included.
 - (9) The prices specified for the purposes of subsection (3)(c) are only such prices as Monitor considers should be so specified and—
 - (a) as Monitor and the Board agree will be so specified, or
 - (b) in default of agreement, as are determined by arbitration as being the prices that will be so specified.
 - (10) Such variations as are specified for the purposes of subsection (5)(a), and such guidance on the application of those variations as is included for the purposes of subsection (6), are only such variations and such guidance as Monitor considers should be so specified and included and—
 - (a) as Monitor and the Board agree will be so specified and included, or
 - (b) in default of agreement, as are determined by arbitration as being the variations that will be so specified and the guidance that will be so included.
 - (11) Such rules as are specified for the purposes of subsection (4) or (5)(c), and such guidance on those rules as is included for the purposes of subsection (6), are only such rules and such guidance as the National Health Service Commissioning Board considers should be so specified and included and—
 - (a) as the Board and Monitor agree will be so specified and included, or
 - (b) in default of agreement, as are determined by arbitration as being the rules that will be so specified and the guidance that will be so included.
 - (12) Such rules as are specified for the purposes of subsection (5)(b), and such guidance on those rules as is included for the purposes of subsection (6), are only such rules and such guidance as Monitor considers should be so specified and included and—

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- (a) as Monitor and the Board agree will be so specified and included, or
 - (b) in default of agreement, as are determined by arbitration as being the rules that will be so specified and the guidance that will be so included.
- (13) A notice under this section must specify when the consultation period in relation to the proposals ends; and for that purpose, the consultation period is the period of 28 days beginning with the day after that on which the notice is published under subsection (2).
- (14) In this section, a “relevant provider” is—
- (a) a licence holder, or
 - (b) such other person, of such description as may be prescribed, as provides health care services for the purposes of the NHS.

119 Consultation: further provision

- (1) For the purpose of securing that the prices payable for the provision of health care services for the purposes of the NHS are such as to result in a fair level of pay for providers of the services, the National Health Service Commissioning Board and Monitor must, in exercising functions under section 118, have regard to—
- (a) differences in the costs incurred in providing health care services for the purposes of the NHS to persons of different descriptions, and
 - (b) differences between providers with respect to the range of health care services that they provide for those purposes.
- (2) In exercising functions under section 118(7), the Board and Monitor must act with a view to securing the standardisation throughout England of the specification of health care services in the national tariff under section 116(1)(a).
- (3) In exercising functions under section 118(12), Monitor and the Board must act with a view to securing the standardisation throughout England of the specification of health care services in rules provided for in the national tariff under section 116(4)(b).
- (4) In carrying out the duty under subsection (2) or (3), the Board and Monitor must have regard to whether, or to what extent, standardisation is likely to have a significant adverse impact on the provision of health care services for the purposes of the NHS.

120 Responses to consultation

- (1) If Monitor receives objections from one or more clinical commissioning groups or relevant providers to a method it proposes under section 118(3)(b), Monitor may not publish the national tariff unless—
- (a) the conditions in subsection (2) are met, or
 - (b) where those conditions are not met, Monitor has made a reference to the Competition Commission.
- (2) The conditions referred to in subsection (1)(a) are that—
- (a) the objection percentage for clinical commissioning groups is less than the prescribed percentage,
 - (b) the objection percentage for relevant providers is less than the prescribed percentage, and
 - (c) the share of supply percentage is less than such percentage as may be prescribed.

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- (3) In subsection (2)—
- (a) the “objection percentage” is the proportion (expressed as a percentage) of clinical commissioning groups or (as the case may be) relevant providers who objected to the proposed method, and
 - (b) the “share of supply percentage” is the proportion (expressed as a percentage) of relevant providers who objected to the proposed method, weighted according to their share of the supply in England of such services as may be prescribed.
- (4) A reference under subsection (1)(b) must require the Competition Commission to determine whether the method proposed under section 118(3)(b) is appropriate.
- (5) The functions of the Competition Commission with respect to a reference under this section are not to be regarded as general functions of its for the purposes of Part 2 of Schedule 7 to the Competition Act 1998; instead, Schedule 12 to this Act (procedure on a reference under this section) has effect.
- (6) Regulations prescribing a percentage for the purposes of subsection (2)(c) may include provision prescribing the method used for determining a relevant provider’s share of the supply in England of the services concerned.
- (7) In this section and section 121 and Schedule 12, “relevant provider” has the meaning given in section 118(14).

121 Determination on reference under section 120

- (1) In carrying out a determination on a reference under section 120, the Competition Commission must have regard, to the same extent as is required of Monitor, to the matters to which Monitor must have regard in carrying out the functions of its to which the determination relates.
- (2) In carrying out the determination, the Competition Commission must also have regard to such representations as are made to it by clinical commissioning groups or relevant providers who made objections to Monitor in accordance with paragraph 2 of Schedule 12 about the method proposed under section 118(3)(b).
- (3) In carrying out the determination, the Competition Commission—
- (a) may also have regard to matters to which Monitor was not able to have regard in the case to which the determination relates, but
 - (b) must not, in the exercise of the power under paragraph (a), have regard to a matter to which Monitor would not have been entitled to have regard in that case had it had the opportunity to do so.
- (4) The Commission may determine that the method proposed under section 118(3)(b) is not appropriate only if it is satisfied that Monitor’s decision to propose the method was wrong on one or more of the following grounds—
- (a) that Monitor failed to have regard to the matters referred to in subsection (1),
 - (b) that the decision was based, wholly or partly, on an error of fact,
 - (c) that the decision was wrong in law.
- (5) Where the Commission determines that the method proposed under section 118(3)(b) is appropriate, Monitor may use that method for the purposes of the national tariff accordingly.

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- (6) Where the Commission determines that the method proposed under section 118(3)(b) is not appropriate, it must remit the matter to Monitor for reconsideration and decision in accordance with such directions as the Commission may give.
- (7) A direction under subsection (6) may, in particular, require Monitor to make such changes to the method in question as are specified in the direction.
- (8) A determination on a reference under section 120—
 - (a) must be contained in an order made by the Commission,
 - (b) must set out the reasons for the determination, and
 - (c) takes effect at the time specified in the order or determined in accordance with provision made in the order.
- (9) The Commission must give notice of a determination on a reference under section 120 to—
 - (a) Monitor,
 - (b) the National Health Service Commissioning Board, and
 - (c) such clinical commissioning groups or relevant providers as made representations in accordance with paragraph 2 of Schedule 12.
- (10) The Commission must also publish the determination; but it must exclude from what it publishes information which it is satisfied is—
 - (a) commercial information the disclosure of which would, or might, significantly harm the legitimate business interests of an undertaking to which it relates;
 - (b) information relating to the private affairs of an individual the disclosure of which would, or might, significantly harm that person's interests.

122 Changes following determination on reference under section 120

- (1) Where the Competition Commission remits a matter to Monitor under subsection (6) of section 121, Monitor must make such changes to the method to which the matter relates as it considers necessary, having regard to the reasons specified for the purposes of subsection (8)(b) of that section.
- (2) Monitor must give the Competition Commission and the National Health Service Commissioning Board a notice specifying—
 - (a) the changes it proposes to make, and
 - (b) its reasons for proposing to make them.
- (3) Monitor must make the changes specified in the notice unless it is given a direction under section 123 before the end of the period of 28 days beginning with the day after that on which it gave the notice.
- (4) If Monitor is given a direction under that section before the end of that period, it must make such of the changes as are not specified in the direction.

123 Power to veto changes proposed under section 122

- (1) The Competition Commission may, within the period of 28 days beginning with the day after that on which it is given a notice under section 122, direct Monitor—
 - (a) not to make the changes specified in the notice, or
 - (b) not to make such of those changes as may be specified in the direction.

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- (2) Monitor must comply with a direction under this section.
- (3) The Secretary of State may, within that period and on the application of the Commission, direct that the period for giving a direction under this section (and, accordingly, the period referred to in section 122(3)) is to be extended by 14 days.
- (4) The Competition Commission may give a direction under this section only in respect of such of the changes specified in the notice under section 122 as it considers are not necessary in consequence of its determination on the reference.
- (5) If the Commission gives a direction under this section, it—
 - (a) must give notice specifying the changes proposed by Monitor, the terms of the direction and the reasons for giving it, and
 - (b) must itself make such changes to the method to which the reference relates as it considers necessary in consequence of its determination on the reference.
- (6) In exercising its function under subsection (5)(b), the Commission must have regard to the matters to which Monitor must have regard when determining the method to which the reference relates.
- (7) Before making changes under subsection (5)(b), the Commission must give notice to Monitor and the National Health Service Commissioning Board specifying—
 - (a) the changes it proposes to make,
 - (b) its reasons for proposing to make them, and
 - (c) the period within which representations on the proposed changes may be made.
- (8) The period specified for the purposes of subsection (7)(c) must not be less than 28 days beginning with the day on which the notice is given.

124 Local modifications of prices: agreements

- (1) The commissioner and the provider of a health care service may agree that the price payable to the provider for the provision of the service for the purposes of the NHS in such circumstances or areas as may be determined in accordance with the agreement is the price determined in accordance with the national tariff for that service as modified in accordance with the agreement.
- (2) An agreement under this section must specify the date on which the modification is to take effect; and a date specified for that purpose may be earlier than the date of the agreement (but not earlier than the date on which the national tariff took effect).
- (3) An agreement under this section has effect only if it is approved by Monitor.
- (4) An agreement submitted for approval under subsection (3) must be supported by such evidence as Monitor may require.
- (5) Monitor may approve an agreement under this section only if, having applied the method specified under section 116(1)(d), it is satisfied that, without a modification to the price determined in accordance with the national tariff for that service, it would be uneconomic for the provider to provide the service for the purposes of the NHS.
- (6) Where an agreement is approved under subsection (3), Monitor must send a notice to the Secretary of State and such clinical commissioning groups, providers and other persons as it considers appropriate.

- (7) Monitor must also publish the notice.
- (8) The notice must specify—
 - (a) the modification, and
 - (b) the date on which it takes effect.
- (9) If the Secretary of State considers that the modification gives or may give rise (or, where it has yet to take effect, would or might give rise) to liability for breach of an EU obligation, the Secretary of State may give a direction to that effect; and the modification is (or is to be) of no effect in so far as it is subject to the direction.

125 Local modifications of prices: applications

- (1) Monitor may, on an application by a provider of a health care service who has failed to reach an agreement under section 124 with the commissioner, decide that the price payable to the provider for the provision of the service for the purposes of the NHS in such circumstances or areas as Monitor may determine is to be the price determined in accordance with the national tariff for that service as modified in such way as Monitor may determine.
- (2) An application under this section must be supported by such evidence as Monitor may require.
- (3) Monitor may grant an application under this section only if, having applied the method under section 116(1)(d), it is satisfied that, without a modification to the price determined in accordance with the national tariff for that service, it would be uneconomic for the provider to provide the service for the purposes of the NHS.
- (4) Subsections (5) to (8) apply where Monitor grants an application under this section.
- (5) The decision by Monitor on the application takes effect on such date as Monitor may determine; and a date determined for that purpose may be earlier than the date of the decision (but not earlier than the date on which the national tariff took effect).
- (6) Monitor must send a notice of the decision to the Secretary of State and such clinical commissioning groups, providers and other persons as it considers appropriate.
- (7) Monitor must also publish the notice.
- (8) The notice must specify—
 - (a) the modification, and
 - (b) the date on which it takes effect.
- (9) If the Secretary of State considers that the modification gives or may give rise (or, where it has yet to take effect, would or might give rise) to liability for breach of an EU obligation, the Secretary of State may give a direction to that effect; and the modification is (or is to be) of no effect in so far as it is subject to the direction.

126 Applications under section 125: notification of commissioners

- (1) This section applies where Monitor—
 - (a) receives an application under section 125, and
 - (b) is satisfied that the continued provision for the purposes of the NHS of health care services to which a condition in the applicant's licence under

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section 97(1)(i), (j) or (k) applies is being put at significant risk by the configuration of certain health care services provided for those purposes.

- (2) In subsection (1), a reference to the provision of services is a reference to their provision by the applicant or any other provider.
- (3) Monitor must as soon as reasonably practicable notify the National Health Service Commissioning Board and such clinical commissioning groups as Monitor considers appropriate—
 - (a) of its receipt of the application, and
 - (b) of its reasons for being satisfied as mentioned in subsection (1)(b).
- (4) Monitor must publish for each financial year a list of the notifications under this section that it has given during that year; and the list must include for each notification a summary of Monitor’s reasons for being satisfied as mentioned in subsection (1)(b).
- (5) The Board and clinical commissioning groups, having received a notification under this section, must have regard to it in arranging for the provision of health care services for the purposes of the NHS.

127 Correction of mistakes

- (1) This section applies where the national tariff contains information that does not accord with—
 - (a) what Monitor and the National Health Service Commissioning Board agreed on the matter concerned, or
 - (b) where the matter was determined by arbitration, what was determined.
- (2) Monitor must send a notice to—
 - (a) each clinical commissioning group,
 - (b) each relevant provider, and
 - (c) such other persons as Monitor considers appropriate.
- (3) Monitor must also publish the notice.
- (4) The notice must specify—
 - (a) the information that does not accord with what was agreed or determined,
 - (b) the correction required to make the information so accord, and
 - (c) the date on which the correction is to take effect.
- (5) A date specified for the purposes of subsection (4)(c) may be earlier than the date of the notice.
- (6) In this section, “relevant provider” has the meaning given in section 118(14).

CHAPTER 5

HEALTH SPECIAL ADMINISTRATION

128 Health special administration orders

- (1) In this Chapter “health special administration order” means an order which—
 - (a) is made by the court in relation to a relevant provider, and

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- (b) directs that the affairs, business and property of the provider are to be managed by one or more persons appointed by the court.
- (2) An application to the court for a health special administration order may be made only by Monitor.
- (3) A person appointed as mentioned in subsection (1)(b) is referred to in this Chapter as a “health special administrator”.
- (4) A health special administrator of a company—
 - (a) is an officer of the court, and
 - (b) in exercising functions in relation to the company, is the company’s agent.
- (5) A person is not to be the health special administrator of a company unless the person is qualified to act as an insolvency practitioner in relation to the company.
- (6) A health special administrator of a relevant provider must manage its affairs, business and property, and exercise the health special administrator’s functions, so as to—
 - (a) achieve the objective set out in section 129 as quickly and as efficiently as is reasonably practicable,
 - (b) in seeking to achieve that objective, ensure that any regulated activity carried on in providing the services provided by the provider is carried on in accordance with any requirements or conditions imposed in respect of that activity by virtue of Chapter 2 of Part 1 of the Health and Social Care Act 2008,
 - (c) so far as is consistent with the objective set out in section 129, protect the interests of the creditors of the provider as a whole, and
 - (d) so far as is consistent with that objective and subject to those interests, protect the interests of the members of the provider as a whole.
- (7) In relation to a health special administration order applying to a non-GB company, references in this Chapter to the affairs, business and property of the company are references only to its affairs and business so far as carried on in Great Britain and to its property in Great Britain.
- (8) In this section—
 - (a) a reference to a person qualified to act as an insolvency practitioner in relation to a company is to be construed in accordance with Part 13 of the Insolvency Act 1986 (insolvency practitioners and their qualifications);
 - (b) “regulated activity” has the same meaning as in Part 1 of the Health and Social Care Act 2008 (see section 8 of that Act).
- (9) In this Chapter—
 - “business” and “property” each have the same meaning as in the Insolvency Act 1986 (see section 436 of that Act);
 - “company” includes a company not registered under the Companies Act 2006;
 - “court”, in relation to a company, means the court—
 - (a) having jurisdiction to wind up the company, or
 - (b) that would have such jurisdiction apart from section 221(2) or 441(2) of the Insolvency Act 1986 (exclusion of winding up jurisdiction in case of companies incorporated in, or having principal place of business in, Northern Ireland);

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“member” is to be read in accordance with section 250 of the Insolvency Act 1986;

“non-GB company” means a company incorporated outside Great Britain;

“relevant provider” means a company which is providing services to which a condition included in the company’s licence under section 97(1)(i), (j) or (k) applies;

“wholly-owned subsidiary” has the meaning given by section 1159 of the Companies Act 2006.

129 Objective of a health special administration

- (1) The objective of a health special administration is to secure—
 - (a) the continued provision of such of the health care services provided for the purposes of the NHS by the company subject to the health special administration order, at such level, as the commissioners of those services determine by applying criteria specified in health special administration regulations (see section 130), and
 - (b) that it becomes unnecessary, by one or both of the means set out in subsection (2), for the health special administration order to remain in force for that purpose.
- (2) Those means are—
 - (a) the rescue as a going concern of the company subject to the health special administration order, and
 - (b) one or more transfers falling within subsection (3).
- (3) A transfer falls within this subsection if it is a transfer as a going concern—
 - (a) to another person, or
 - (b) as respects different parts of the undertaking of the company subject to the health special administration order, to two or more other persons,
 of so much of that undertaking as it is appropriate to transfer for the purpose of achieving the objective of the health special administration.
- (4) The means by which a transfer falling within subsection (3) may be effected include in particular—
 - (a) a transfer of the undertaking of the company subject to the health special administration order, or of part of its undertaking, to a wholly-owned subsidiary of that company, and
 - (b) a transfer to a company of securities of a wholly-owned subsidiary to which there has been a transfer falling within paragraph (a).
- (5) The objective of a health special administration may be achieved by transfers to the extent only that—
 - (a) the rescue as a going concern of the company subject to the health special administration order is not reasonably practicable or is not reasonably practicable without such transfers,
 - (b) the rescue of the company as a going concern will not achieve that objective or will not do so without such transfers,
 - (c) such transfers would produce a result for the company’s creditors as a whole that is better than the result that would be produced without them, or

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- (d) such transfers would, without prejudicing the interests of its creditors as a whole, produce a result for the company’s members as a whole that is better than the result that would be produced without them.

130 Health special administration regulations

- (1) Regulations (referred to in this Chapter as “health special administration regulations”) must make further provision about health special administration orders.
- (2) Health special administration regulations may apply with or without modifications—
 - (a) any provision of Part 2 of the Insolvency Act 1986 (administration) or any related provision of that Act, and
 - (b) any other enactment which relates to insolvency or administration or makes provision by reference to anything that is or may be done under that Act.
- (3) Health special administration regulations may, in particular, provide that the court may make a health special administration order in relation to a relevant provider if it is satisfied, on a petition by the Secretary of State under section 124A of the Insolvency Act 1986 (petition for winding up on grounds of public interest), that it would be just and equitable (disregarding the objective of the health special administration) to wind up the provider in the public interest.
- (4) Health special administration regulations may make provision about—
 - (a) the application of procedures under the Insolvency Act 1986 in relation to relevant providers, and
 - (b) the enforcement of security over property of relevant providers.
- (5) Health special administration regulations may, in particular, make provision about the publication and maintenance by Monitor of a list of relevant providers.
- (6) Health special administration regulations may in particular—
 - (a) require Monitor to publish guidance for commissioners about the application of the criteria referred to in section 129(1)(a);
 - (b) confer power on Monitor to revise guidance published by virtue of paragraph (a) and require it to publish guidance so revised;
 - (c) require Monitor, before publishing guidance by virtue of paragraph (a) or (b), to obtain the approval of the Secretary of State and the National Health Service Commissioning Board;
 - (d) require commissioners, when applying the criteria referred to in section 129(1)(a), to have regard to such matters as Monitor may specify in guidance published by virtue of paragraph (a) or (b);
 - (e) require the National Health Service Commissioning Board to make arrangements for facilitating agreement between commissioners in their exercise of their function under section 129(1)(a);
 - (f) confer power on the Board, where commissioners fail to reach agreement in pursuance of arrangements made by virtue of paragraph (e), to exercise their function under section 129(1)(a);
 - (g) provide that, in consequence of the exercise of the power conferred by virtue of paragraph (f), the function under section 129(1)(a), so far as applying to the commissioners concerned, is to be regarded as discharged;

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- (h) require a health special administrator to carry out in accordance with the regulations consultation on the action which the administrator recommends should be taken in relation to the provider concerned.
- (7) Health special administration regulations may modify this Chapter or any enactment mentioned in subsection (8) in relation to any provision made by virtue of this Chapter.
- (8) The enactments are—
 - (a) the Insolvency Act 1986, and
 - (b) any other enactment which relates to insolvency or administration or makes provision by reference to anything that is or may be done under that Act.
- (9) The power to make rules under section 411 of the Insolvency Act 1986 (company insolvency rules) applies for the purpose of giving effect to provision made by virtue of this Chapter as it applies for the purpose of giving effect to Parts 1 to 7 of that Act.
- (10) For that purpose—
 - (a) the power to make rules in relation to England and Wales is exercisable by the Lord Chancellor with the concurrence of the Secretary of State and, in the case of rules that affect court procedure, with the concurrence of the Lord Chief Justice;
 - (b) the power to make rules in relation to Scotland is exercisable by the Secretary of State;
 - (c) references in section 411 of that Act to those Parts are to be read as including a reference to this Chapter.
- (11) Before making health special administration regulations the Secretary of State must consult—
 - (a) Monitor, and
 - (b) such other persons as the Secretary of State considers appropriate.

131 Transfer schemes

- (1) Health special administration regulations may make provision about transfer schemes to achieve the objective of a health special administration (see section 129).
- (2) Health special administration regulations may, in particular, include provision—
 - (a) for the making of a transfer scheme to be subject to the consent of Monitor and the person to whom the transfer is being made,
 - (b) for Monitor to have power to modify a transfer scheme with the consent of parties to the transfers effected by the scheme, and
 - (c) for modifications made to a transfer scheme by virtue of paragraph (b) to have effect from such time as Monitor may specify (which may be a time before the modifications were made).
- (3) Health special administration regulations may, in particular, provide that a transfer scheme may include provision—
 - (a) for the transfer of rights and liabilities under or in connection with a contract of employment from a company subject to a health special administration order to another person,
 - (b) for the transfer of property, or rights and liabilities other than those mentioned in paragraph (a), from a company subject to a health special administration order to another person,

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- (c) for the transfer of property, rights and liabilities which would not otherwise be capable of being transferred or assigned,
- (d) for the transfer of property acquired, and rights and liabilities arising, after the making of the scheme,
- (e) for the creation of interests or rights, or the imposition of liabilities, and
- (f) for the transfer, or concurrent exercise, of functions under enactments.

132 Indemnities

Health special administration regulations may make provision about the giving by Monitor of indemnities in respect of—

- (a) liabilities incurred in connection with the discharge by health special administrators of their functions, and
- (b) loss or damage sustained in that connection.

133 Modification of this Chapter under Enterprise Act 2002

- (1) The power to modify or apply enactments conferred on the Secretary of State by each of the sections of the Enterprise Act 2002 mentioned in subsection (2) includes power to make such consequential modifications of provision made by virtue of this Chapter as the Secretary of State considers appropriate in connection with any other provision made under that section.
- (2) Those sections are—
 - (a) sections 248 and 277 (amendments consequential on that Act), and
 - (b) section 254 (power to apply insolvency law to foreign companies).

CHAPTER 6

FINANCIAL ASSISTANCE IN SPECIAL ADMINISTRATION CASES

Establishment of mechanisms

134 Duty to establish mechanisms for providing financial assistance

- (1) Monitor must establish, and secure the effective operation of, one or more mechanisms for providing financial assistance in cases where a provider of health care services for the purposes of the NHS (referred to in this Chapter as a “provider”) is subject to—
 - (a) a health special administration order (within the meaning of Chapter 5), or
 - (b) an order under section 65D(2) of the National Health Service Act 2006 (trust special administration for NHS foundation trusts).
- (2) Mechanisms that Monitor may establish under this section include, in particular—
 - (a) mechanisms for raising money to make grants or loans or to make payments in consequence of indemnities given by Monitor by virtue of section 132 or under section 65D(12) of the National Health Service Act 2006;
 - (b) mechanisms for securing that providers arrange, or are provided with, insurance facilities.

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- (3) Monitor may secure that a mechanism established under this section operates so as to enable it to recover the costs it incurs in establishing and operating the mechanism.
- (4) Monitor may establish different mechanisms for different providers or providers of different descriptions.
- (5) Monitor does not require permission under any provision of the Financial Services and Markets Act 2000 as respects activities carried out under this Chapter.
- (6) An order under section 306 providing for the commencement of this Chapter may require Monitor to comply with the duty to establish under subsection (1) before such date as the order specifies.

135 Power to establish fund

- (1) Monitor may, for the purposes of section 134, establish and maintain a fund.
- (2) In order to raise money for investment in a fund it establishes under this section, Monitor may impose requirements on providers or commissioners.
- (3) Monitor must appoint at least two managers for a fund it establishes under this section.
- (4) A manager of a fund may be an individual, a firm or a body corporate.
- (5) Monitor must not appoint an individual as manager of a fund unless it is satisfied that the individual has the appropriate knowledge and experience for managing investments.
- (6) Monitor must not appoint a firm or body corporate as manager of a fund unless it is satisfied that arrangements are in place to secure that any individual who will exercise functions of the firm or body corporate as manager will, at the time of doing so, have the appropriate knowledge and experience for managing investments.
- (7) Monitor must not appoint an individual, firm or body corporate as manager of a fund unless the individual, firm or body is an authorised or exempt person within the meaning of the Financial Services and Markets Act 2000.
- (8) Monitor must secure the prudent management of any fund it establishes under this section.

Applications for financial assistance

136 Applications

- (1) Monitor may, on an application by a special administrator, provide financial assistance to the special administrator by using a mechanism established under section 134.
- (2) An application under this section must be in such form, and must be supported by such evidence or other information, as Monitor may require (and a requirement under this subsection may be imposed after the receipt, but before the determination, of the application).
- (3) If Monitor grants an application under this section, it must notify the applicant of—
 - (a) the purpose for which the financial assistance is being provided, and
 - (b) the other conditions to which its provision is subject.

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- (4) The special administrator must secure that the financial assistance is used only—
 - (a) for the purpose notified under subsection (3)(a), and
 - (b) in accordance with the conditions notified under subsection (3)(b).
- (5) Financial assistance under this section may be provided only in the period during which the provider in question is in special administration.
- (6) If Monitor refuses an application under this section, it must notify the applicant of the reasons for the refusal.
- (7) Monitor must, on a request by an applicant whose application under this section has been refused, reconsider the application; but no individual involved in the decision to refuse the application may be involved in the decision on the reconsideration of the application.
- (8) For the purposes of reconsidering an application, Monitor may request information from the applicant.
- (9) Monitor must notify the applicant of its decision on reconsidering the application; and—
 - (a) if Monitor grants the application, it must notify the applicant of the matters specified in subsection (3), and
 - (b) if Monitor refuses the application, it must notify the applicant of the reasons for the refusal.
- (10) In this Chapter—
 - (a) “special administrator” means—
 - (i) a person appointed as a health special administrator under Chapter 5, or
 - (ii) a person appointed as a trust special administrator under section 65D(2) of the National Health Service Act 2006, and
 - (b) references to being in special administration are to be construed accordingly.

137 Grants and loans

- (1) Monitor may not provide financial assistance under section 136 in the form of a grant or loan unless it is satisfied that—
 - (a) it is necessary for the provider—
 - (i) to be able to continue to provide one or more of the health care services that it provides for the purposes of the NHS, or
 - (ii) to be able to secure a viable business in the long term, and
 - (b) no other source of funding which would enable it do so and on which it would be reasonable for it to rely is likely to become available to it.
- (2) The terms of a grant or loan must include a term that the whole or a specified part of the grant or loan becomes repayable in the event of a breach by the provider or special administrator of the terms of the grant or loan.
- (3) Subject to that, where Monitor makes a grant or loan under section 136, it may do so in such manner and on such terms as it may determine.
- (4) Monitor may take such steps as it considers appropriate (including steps to adjust the amount of future payments towards the mechanism established under section 134

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to raise funds for grants or loans under section 136) to recover overpayments in the provision of a grant or loan under that section.

- (5) The power to recover an overpayment under subsection (4) includes a power to recover interest, at such rate as Monitor may determine, on the amount of the overpayment for the period beginning with the making of the overpayment and ending with its recovery.

Charges on commissioners

138 Power to impose charges on commissioners

- (1) The Secretary of State may by regulations confer power on Monitor to require commissioners to pay charges relating to such of Monitor’s functions that relate to securing the continued provision of health care services for the purposes of the NHS.
- (2) The regulations must provide that the amount of a charge imposed by virtue of this section is to be such amount—
- (a) as may be prescribed, or
 - (b) as is determined by reference to such criteria, and by using such method, as may be prescribed.
- (3) The regulations must—
- (a) prescribe to whom the charge is to be paid;
 - (b) prescribe when the charge becomes payable;
 - (c) where the amount of the charge is to be determined in accordance with subsection (2)(b), require Monitor to carry out consultation in accordance with the regulations before imposing the charge;
 - (d) provide for any amount that is not paid by the time prescribed for the purposes of paragraph (b) to carry interest at the rate for the time being specified in section 18 of the Judgments Act 1838;
 - (e) provide for any unpaid balance and accrued interest to be recoverable summarily as a civil debt (but for this not to affect any other method of recovery).
- (4) Where the person that the regulations prescribe for the purposes of subsection (3)(a) is a provider, the regulations may confer power on Monitor to require the provider to pay Monitor the amount of the charge in question in accordance with the regulations.
- (5) Before making regulations under this section, the Secretary of State must consult—
- (a) Monitor, and
 - (b) the National Health Service Commissioning Board.
- (6) Regulations under this section may apply with modifications provision made by sections 141 to 143 in relation to charges imposed by virtue of this section.

Levy on providers

139 Imposition of levy

- (1) The power under section 135(2) includes, in particular, power to impose a levy on providers for each financial year.

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- (2) Before deciding whether to impose a levy under this section for the coming financial year, Monitor must estimate—
 - (a) the amount that will be required for the purpose of providing financial assistance in accordance with this Chapter,
 - (b) the amount that will be collected from commissioners by way of charges imposed by virtue of section 138 during that year, and
 - (c) the amount that will be standing to the credit of the fund at the end of the current financial year.
- (3) Before the start of a financial year in which Monitor proposes to impose a levy under this section, it must determine—
 - (a) the factors by reference to which the rate of the levy is to be assessed,
 - (b) the time or times by reference to which those factors are to be assessed, and
 - (c) the time or times during the year when the levy, or an instalment of it, becomes payable.
- (4) Where the determinations under subsection (3) reflect changes made to the factors by reference to which the rate of the levy is to be assessed, the notice under section 143(1)(b) must include an explanation of those changes.
- (5) A levy under this section may be imposed at different rates for different providers.

140 Power of Secretary of State to set limit on levy and charges

- (1) Before the beginning of each financial year, the Secretary of State may, with the approval of the Treasury, specify by order—
 - (a) the maximum amount that Monitor may raise from levies it imposes under section 139 for that year, and
 - (b) the maximum amount that it may raise from charges it imposes by virtue of section 138 for that year.
- (2) Where the Secretary of State makes an order under this section, Monitor must secure that the levies and charges for that year are at a level that Monitor estimates will, in each case, raise an amount not exceeding the amount specified for that case in the order.

141 Consultation

- (1) This section applies where Monitor is proposing to impose a levy under section 139 for the coming financial year and—
 - (a) has not imposed a levy under that section for the current financial year or any previous year,
 - (b) has been imposing the levy for the current financial year but proposes to make relevant changes to it for the coming financial year, or
 - (c) has been imposing the levy for the current financial year and the financial year preceding it, but has not been required to serve a notice under this section in respect of the levy for either of those years.
- (2) A change to a levy is relevant for the purposes of subsection (1)(b) if it is a change to the factors by reference to which the rate of the levy is to be assessed.

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- (3) Before making the determinations under section 139(3) in respect of the levy, Monitor must send a notice to—
- (a) the Secretary of State,
 - (b) the National Health Service Commissioning Board,
 - (c) each clinical commissioning group,
 - (d) each potentially liable provider, and
 - (e) such other persons as it considers appropriate.
- (4) Monitor must publish a notice that it sends under subsection (3).
- (5) In a case within subsection (1)(a) or (c), the notice must state—
- (a) the factors by reference to which Monitor proposes to assess the rate of the levy,
 - (b) the time or times by reference to which it proposes to assess those factors, and
 - (c) the time or times during the coming financial year when it proposes that the levy, or an instalment of it, will become payable.
- (6) In a case within subsection (1)(b), the notice must specify the relevant changes Monitor proposes to make.
- (7) A notice under this section must specify when the consultation period in relation to the proposals ends; and for that purpose, the consultation period is the period of 28 days beginning with the day on which the notice is published under subsection (4).
- (8) In this section and section 142 a “potentially liable provider” means a provider on whom Monitor is proposing to impose the levy for the coming financial year (regardless of the amount (if any) that the provider would be liable to pay as a result of the proposal).

142 Responses to consultation

- (1) If Monitor receives objections from one or more potentially liable providers to its proposals, it may not give notice under section 143(1)(b) unless—
- (a) the conditions in subsection (2) are met, or
 - (b) where those conditions are not met, Monitor has made a reference to the Competition Commission.
- (2) The conditions referred to in subsection (1)(a) are that—
- (a) one or more potentially liable providers object to the proposals within the consultation period, and
 - (b) the objection percentage and the share of supply percentage are each less than the prescribed percentage.
- (3) In subsection (2)—
- (a) the “objection percentage” is the proportion (expressed as a percentage) of the potentially liable providers who objected to the proposals, and
 - (b) the “share of supply percentage” is the proportion (expressed as a percentage) of the potentially liable providers who objected to the proposals, weighted according to their share of the supply in England of such services as may be prescribed.

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- (4) A reference under subsection (1)(b) must be so framed as to require the Competition Commission to investigate and report on the questions—
 - (a) whether in making the proposals, Monitor failed to give sufficient weight to the matters in section 66,
 - (b) if so, whether that failure operates, or may be expected to operate, against the public interest, and
 - (c) if so, whether the effects adverse to the public interest which that failure has or may be expected to have could be remedied or prevented by changes to the proposals.
- (5) Schedule 10 (which makes further provision about references to the Competition Commission) has effect in relation to a reference under subsection (1)(b); and for that purpose—
 - (a) paragraph 1 is to be ignored,
 - (b) in paragraph 5(2), the reference to six months is to be read as a reference to two months,
 - (c) in paragraph 5(4), the reference to six months is to be read as a reference to one month,
 - (d) in paragraph 7, sub-paragraphs (4) to (7) and (9) are to be ignored (and, in consequence of that, in sub-paragraph (8), the words from the beginning to “sub-paragraph (4)(c)” are also to be ignored), and
 - (e) the references to relevant persons are to be construed in accordance with subsection (6).
- (6) The relevant persons referred to in Schedule 10 are—
 - (a) in paragraphs 3, 5(6) and 6(6)—
 - (i) the National Health Service Commissioning Board, and
 - (ii) the potentially liable providers who objected to the proposals, and
 - (b) in paragraph 8(10)—
 - (i) Monitor, and
 - (ii) the potentially liable providers who objected to the proposals.
- (7) In investigating the question under subsection (4)(a), the Competition Commission must have regard to the matters in relation to which Monitor has duties under this Chapter.
- (8) Regulations prescribing a percentage for the purposes of subsection (2)(b) may include provision prescribing the method used for determining a provider’s share of the supply in England of the services concerned.

143 Amount payable

- (1) Monitor must—
 - (a) calculate the amount which each provider who is to be subject to a levy under section 139 for a financial year is to be liable to pay in respect of that year, and
 - (b) notify the provider of that amount and the date or dates on which it, or instalments of it, will become payable.
- (2) If the provider is to be subject to the levy for only part of the financial year, it is to be liable to pay only the amount which bears to the amount payable for the whole financial

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year the same proportion as the part of the financial year for which the provider is to be subject to the levy bears to the whole financial year.

- (3) The amount which a provider is liable to pay may be zero.
- (4) Subsection (5) applies if, during a financial year in which Monitor is imposing a levy under section 139, it becomes satisfied that the risk of a provider who is subject to the levy going into special administration has changed by reference to what it was—
 - (a) at the start of the year, or
 - (b) if Monitor has already exercised the power under subsection (5) in relation to the levy in the case of that provider, at the time it did so.
- (5) Monitor may notify the provider that Monitor proposes to adjust the amount that the provider is liable to pay so as to reflect the change; and the notice must specify the amount of the proposed adjustment.
- (6) Following the expiry of the period of 28 days beginning with the day after that on which Monitor sends the notice, it may make the adjustment.
- (7) In a case within subsection (2), subsection (4) has effect as if references to the financial year were references to the part of the financial year for which the provider is to be subject to the levy.
- (8) Where a provider who reasonably believes that Monitor has miscalculated the amount notified to the provider under subsection (1) or (5) requests Monitor to recalculate the amount, Monitor must—
 - (a) comply with the request, and
 - (b) send the provider written notice of its recalculation.
- (9) Subsection (8) does not apply to a request to recalculate an amount in respect of a financial year preceding the one in which the request is made.
- (10) If the whole or part of the amount which a person is liable to pay is not paid by the date by which it is required to be paid, the unpaid balance carries interest at the rate for the time being specified in section 17 of the Judgments Act 1838; and the unpaid balance and accrued interest are recoverable summarily as a civil debt (but this does not affect any other method of recovery).

Supplementary

144 Investment principles and reviews

- (1) Monitor must prepare and publish a statement of the principles that govern its decisions, or decisions made on its behalf, about making investments for the purposes of this Chapter.
- (2) Monitor must—
 - (a) in each financial year, review the statement,
 - (b) if it considers necessary in light of the review, revise the statement, and
 - (c) if it revises the statement, publish the revised statement.
- (3) As soon as reasonably practicable after the end of each financial year, Monitor must undertake and publish a review of the operation during that year of—
 - (a) the procedure for health special administration under Chapter 5,

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- (b) the procedure for trust special administration for NHS foundation trusts under Chapter 5A of Part 2 of the National Health Service Act 2006, and
 - (c) such mechanisms as have been established under section 134.
- (4) The purposes of the review under subsection (3)(c) are—
- (a) to assess the operation of the mechanisms concerned,
 - (b) to assess the accuracy of the estimates given by Monitor in relation to the operation of the mechanisms,
 - (c) to assess what improvements can be made to the process for making estimates in relation to the operation of the mechanisms, and
 - (d) to review the extent of the protection which the mechanisms are required to provide.
- (5) Where a fund established under section 135 has been in operation for the whole or part of the year concerned, the review published under this section must specify—
- (a) the income of the fund during that year, and
 - (b) the expenditure from the fund during that year.
- (6) Monitor must exclude from a review published under this section information which it is satisfied is—
- (a) commercial information the disclosure of which would, or might, significantly harm the legitimate business interests of an undertaking to which it relates;
 - (b) information relating to the private affairs of an individual the disclosure of which would, or might, significantly harm that person’s interests.

145 Borrowing

- (1) Monitor may—
- (a) borrow from a deposit-taker such sums as it may from time to time require for exercising its functions under this Chapter;
 - (b) give security for sums that it borrows.
- (2) But Monitor may not borrow if the effect would be—
- (a) to take the aggregate amount outstanding in respect of the principal of sums borrowed by it over such limit as the Secretary of State may by order specify, or
 - (b) to increase the amount by which the aggregate amount so outstanding exceeds that limit.
- (3) In this section, “deposit-taker” means—
- (a) a person who has permission under Part 4 of the Financial Services and Markets Act 2000, or
 - (b) an EEA firm of the kind mentioned in paragraph 5(b) of Schedule 3 to that Act which has permission under paragraph 15 of that Schedule (as a result of qualifying for authorisation under paragraph 12 of that Schedule) to accept deposits.
- (4) The definition of “deposit-taker” in subsection (3) must be read with—
- (a) section 22 of the Financial Services and Markets Act 2000,
 - (b) any relevant order under that section, and
 - (c) Schedule 2 to that Act.

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146 Shortfall or excess of available funds, etc.

- (1) The Secretary of State may provide financial assistance to Monitor if the Secretary of State is satisfied that—
 - (a) there are insufficient funds available from a mechanism established under section 134, or
 - (b) the mechanism is otherwise unable to operate effectively.
- (2) If the Secretary of State is satisfied that the level of funds available from a mechanism established under section 134 exceeds the level that is necessary, the Secretary of State may direct Monitor to transfer the excess to the Secretary of State.
- (3) If the Secretary of State is satisfied that a mechanism established under section 134 has become dormant, or if a mechanism so established is being wound up, the Secretary of State may direct Monitor to transfer to the Secretary of State such funds as are available from the mechanism.

CHAPTER 7

MISCELLANEOUS AND GENERAL

147 Secretary of State’s duty as respects variation in provision of health services

After section 12D of the National Health Service Act 2006 insert—

“Miscellaneous

12E Secretary of State’s duty as respects variation in provision of health services

- (1) The Secretary of State must not exercise the functions mentioned in subsection (2) for the purpose of causing a variation in the proportion of services provided as part of the health service that is provided by persons of a particular description if that description is by reference to—
 - (a) whether the persons in question are in the public or (as the case may be) private sector, or
 - (b) some other aspect of their status.
- (2) The functions mentioned in this subsection are the functions of the Secretary of State under—
 - (a) sections 6E and 13A, and
 - (b) section 75 of the Health and Social Care Act 2012 (requirements as to procurement, patient choice and competition).”

148 Service of documents

- (1) A notice required under this Part to be given or sent to or served on a person (“R”) may be given or sent to or served on R—
 - (a) by being delivered personally to R,
 - (b) by being sent to R—

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- (i) by a registered post service, as defined by section 125(1) of the Postal Services Act 2000, or
 - (ii) by a postal service which provides for the delivery of the document to be recorded, or
 - (c) subject to section 149, by being sent to R by an electronic communication.
- (2) Where a notice is sent as mentioned in subsection (1)(b), it is, unless the contrary is proved, to be taken to have been received on the third day after the day on which it is sent.
- (3) Where a notice is sent as mentioned in subsection (1)(c) in accordance with section 149, it is, unless the contrary is proved, to be taken to have been received on the next working day after the day on which it is transmitted.
- (4) In subsection (3) “working day” means a day other than—
- (a) a Saturday or a Sunday;
 - (b) Christmas Day or Good Friday; or
 - (c) a day which is a bank holiday in England under the Banking and Financial Dealings Act 1971.
- (5) A notice required under this Part to be given or sent to or served on a body corporate or a firm is duly given, sent or served if it is given or sent to or served on the secretary or clerk of that body or a partner of that firm.
- (6) For the purposes of section 7 of the Interpretation Act 1978 in its application to this section, the proper address of a person is—
- (a) in the case of a person who holds a licence under Chapter 3 who has notified Monitor of an address for service, that address, and
 - (b) in any other case, the address determined in accordance with subsection (7).
- (7) That address is—
- (a) in the case of a secretary or clerk of a body corporate, the address of the registered or principal office of the body,
 - (b) in the case of a partner of a firm, the address of the principal office of the firm, and
 - (c) in any other case, the last known address of the person.
- (8) In this section and in section 149—
- “electronic communication” has the same meaning as in the Electronic Communications Act 2000;
 - “notice” includes any other document.
- (9) This section is subject to paragraph 4(3) of Schedule 8 (delivery of notice from Secretary of State of suspension of non-executive member of Monitor).

149 Electronic communications

- (1) If a notice required or authorised by this Part to be given or sent by or to a person or to be served on a person is sent by an electronic communication, it is to be treated as given, sent or served only if the requirements of subsection (2) or (3) are met.
- (2) If the person required or authorised to give, send or serve the notice is Monitor or the Competition Commission—

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- (a) the person to whom the notice is given or sent or on whom it is served must have indicated to Monitor or (as the case may be) the Commission the person’s willingness to receive notices by an electronic communication and provided an address suitable for that purpose, and
 - (b) the notice must be sent to or given or served at the address so provided.
- (3) If the person required or authorised to give, send or serve the notice is not Monitor or the Competition Commission, the notice must be given, sent or served in such manner as Monitor may require.
- (4) An indication given for the purposes of subsection (2) may be given generally for the purposes of notices required or authorised to be given, sent or served by Monitor or (as the case may be) the Competition Commission under this Part or may be limited to notices of a particular description.
- (5) Monitor must publish such requirements as it imposes under subsection (3).

150 Interpretation, transitional provision and consequential amendments

- (1) In this Part—

“anti-competitive behaviour” has the meaning given in section 64 and references to preventing anti-competitive behaviour are to be read in accordance with subsection (2) of that section;

“commissioner”, in relation to a health care service, means the person who arranges for the provision of the service (and “commission” is to be construed accordingly);

“enactment” includes an enactment contained in subordinate legislation (within the meaning of the Interpretation Act 1978);

“facilities” has the same meaning as in the National Health Service Act 2006 (see section 275 of that Act);

“financial year” means a period of 12 months ending with 31 March;

“health care” and “health care service” each have the meaning given in section 64;

“the NHS” has the meaning given in that section;

“prescribed” means prescribed in regulations;

“service” includes facility.

- (2) Until section 9 comes into force, the references in this Part to the National Health Service Commissioning Board (other than the reference in section 94(11)(b)) are to be read as references to the NHS Commissioning Board Authority.
- (3) Until the day specified by Secretary of State for the purposes of section 14A of the National Health Service Act 2006, the references in this Part to a clinical commissioning group (other than the reference in section 94(11)(a)) are to be read as references to a Primary Care Trust.
- (4) Until section 181 comes into force, the following provisions in this Part are to be read as if the words “and its Healthwatch England committee” were omitted—
- (a) section 83(4)(c);
 - (b) section 84(5)(a)(iii);
 - (c) section 95(2)(e);
 - (d) section 100(2)(e).

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(5) Schedule 13 (which contains minor and consequential amendments) has effect.